(9)

No. 03-6821

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

DAVID NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 9, 2003
Certiorari Granted December 1, 2003

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RELEVANT DOCKET ENTRIES

United States District Court
Middle District of Alabama
Case No. CV-03-T-1008-N
Nelson v. Campbell

October 6, 2003	Complaint for injunctive and declaratory relief filed by plaintiff David Nelson in U.S. District Court for the Middle District of Alabama, Northern Division.
October 6, 2003	Motion by plaintiff David Nelson to proceed *in forma pauperis*.
October 7, 2003	Telephone conference held before United States District Judge Myron H. Thompson for hearing on plaintiff's motions for preliminary injunction and temporary restraining order and on defendants' oral motion for change of venue and motion to dismiss.
October 7, 2003	Motion to dismiss and motion to change venue filed by defendants Donal Campbell, Alabama Department of Corrections, and Grantt Culliver, Warden, Holman Correctional Facility.
October 7, 2003	Notice of providing information to the court filed by defendants.
October 7, 2003	Motion by plaintiff to amend the complaint.
October 7, 2003	Second notice of providing information to the court filed by defendants.

October 7, 2003	Order of Judge Myron H. Thompson granting plaintiff's motion to proceed *in forma pauperis*.
October 7, 2003	Order of Judge Myron H. Thompson granting motion to amend the complaint.
October 7, 2003	Amended complaint filed by plaintiff.
October 7, 2003	Reply brief filed by plaintiff to defendants' motion to dismiss.
October 7, 2003	Motion for production of documents filed by plaintiff.
October 7, 2003	Memorandum opinion of Judge Myron H. Thompson.
October 7, 2003	Judgment of Judge Myron H. Thompson granting defendants' motion to dismiss, dismissing plaintiff's amended complaint without prejudice and ordering that costs be taxed against the plaintiff.
October 7, 2003	Order of Judge Myron H. Thompson directing that plaintiff's motion for a temporary restraining order and preliminary injunction are denied as moot.
October 7, 2003	Order of Judge Myron H. Thompson denying as moot defendants' motion to change venue.
October 7, 2003	Order of Judge Myron H. Thompson denying plaintiff's motion for production of documents.
October 8, 2003	Notice of appeal filed by plaintiff.

October 8, 2003	Motion to proceed on appeal in forma pauperis filed by plaintiff.
October 8, 2003	Order of Judge Myron H. Thompson granting motion to proceed in forma pauperis on appeal.
October 14, 2003	Motion by plaintiff for transcript at no cost to the plaintiff.
October 14, 2003	Order of Judge Myron H. Thompson granting motion for transcript.
November 6, 2003	Motion by plaintiff's attorney Michael McIntyre to appear pro hac vice.
November 6, 2003	Motion by plaintiff's attorney H. Victoria Smith to appear pro hac vice.
November 12, 2003	Order of Judge Myron H. Thompson granting motions for Michael McIntyre and H. Victoria Smith to appear pro hac vice.

United States Court of Appeals for the Eleventh Circuit
Case No. 03-15095-P
Nelson v. Campbell

October 8, 2003	Appellant David Nelson's brief to the Eleventh Circuit Court of Appeals filed.
October 8, 2003	Motion by appellant for a stay of execution and motion to enjoin the defendants from executing him.
October 8, 2003	Appellees Donal Campbell and Grantt Culliver's brief filed at the Eleventh Circuit Court of Appeals.

October 8, 2003	Per curiam opinion of the Eleventh Circuit Court of Appeals affirming the district court's judgment dismissing David Nelson's complaint. The Eleventh Circuit denied the appellant's motion to enjoin the defendants from executing him and denied the appellant's motion for stay of execution.
October 9, 2003	Petitioner's Petition for Rehearing En Banc filed at the Eleventh Circuit Court of Appeals.
October 9, 2003	Order of the Eleventh Circuit Court of Appeals denying appellant's petition for rehearing en banc and denying as moot the appellant's motion to stay the execution during en banc consideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, vs. DONAL CAMPBELL, In his individual and official capacity as Commissioner of the Alabama Department of Corrections and GRANTT CULLIVER, In his individual and official capacity as Warden of William C. Holman Correctional Facility, Defendants.	)	Civil Action File No. ___

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

DAVID LARRY NELSON hereby submits his Complaint for injunctive and declaratory relief against the Defendants named herein, showing in support of the following:

JURISDICTION

1. This action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §1651, 28 U.S.C. §2201, and 28 U.S.C. §1367.

VENUE

2. Venue is proper pursuant to 28 U.S.C. 1391(b) because one or more of the Defendants resides in the Middle District of Alabama.

PARTIES

3. Plaintiff David Larry Nelson is and has been at all times pertinent to this matter a citizen of the United States of America and a citizen of the State of Alabama. He has been an inmate in the State of Alabama since 1978 and presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama.

4. Defendant Donal Campbell is and has been at all times relevant to this action the Commissioner of the Alabama Department of Corrections.

5. Defendant Warden Grantt Culliver is and has been at all times relevant to this action, the Warden of William C. Holman Correctional Facility in Atmore, Alabama.

FACTUAL ALLEGATIONS

6. The Plaintiff presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama (hereinafter referred to as "Holman").

7. The Plaintiff is scheduled to be executed by lethal injection on October 9, 2003 at Holman at 6:00 p.m.

8. The Plaintiff was previously incarcerated at W. E. Donaldson Correctional Facility in Bessemer, Alabama (hereinafter referred to as "Donaldson").

9. The Plaintiff was transferred to Holman upon his death warrant being issued by the Alabama Supreme Court.

10. Pursuant to Ala.Code 1975 §15-18-82, Defendant Culliver, as the Warden at Holman, shall be the executioner at the Plaintiff's execution and Defendant Campbell (hereinafter referred to as "Defendant D.O.C.") acting in his official capacity of the Commissioner of the Alabama Department of Corrections will provide the necessary "room and appliances to carry out" the Plaintiff's execution.

11. The Plaintiff has severely compromised veins and has encountered problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations.

12. The Plaintiff is unable to attach a copy of his medical records to this pleading in support of the above allegation, because Defendant D.O.C. has refused to allow the Plaintiff access to his own medical records. (See, Correspondence to undersigned counsel Smith from the Alabama Department of Corrections, attached to this pleading as Attachment 1).

13. On at least one occasion, prison medical personnel has relinquished control of medical apparatus to the Plaintiff for the Plaintiff to draw his own blood after failed attempts by the medical personnel to do same.

14. Counsel for the Plaintiff contacted Defendant Culliver the day that the Plaintiff was transferred from Donaldson to Holman and informed Defendant Culliver of the Plaintiff's physical problems regarding his veins and

of concerns regarding the protocol for gaining venous access for the lethal injection procedure.

15. At that time, counsel for the Plaintiff requested that either a private practice physician hired by the Plaintiff be allowed to examine and consult with the Plaintiff regarding venous access for the lethal injection procedure or that a prison physician examine and consult with the Plaintiff regarding same.

16. Defendant Culliver assured counsel for the Plaintiff that he would arrange for a physician to examine and consult with the Plaintiff regarding this issue soon after the Plaintiff's arrival at Holman. (See Correspondence from undersigned counsel Smith to Warden Culliver confirming their telephone conversation, attached to this pleading as Attachment 2).

17. As of the filing date of this pleading, Defendant Culliver has failed to have a physician so examine and consult with the Plaintiff.

18. Defendant Culliver has refused repeated requests that a private physician hired by the Plaintiff be allowed to examine and consult with the Plaintiff.

19. Said refusal is a clear violation of Ala.Code 1975 §15-18-81, which provides in relevant part, " . . . all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business . . . ". A copy of Ala.Code 1975 §15-18-81 is attached to this pleading as Attachment 3.

20. Defendant Culliver furthermore has refused to allow that same private physician to conduct a telephone conference with the medical personnel Defendant Culliver

intends to have perform a venous access procedure immediately prior to the Plaintiff's execution or with any other prison medical personnel.

21. During the telephone conversation referenced in Paragraph 14 above, counsel for the Plaintiff requested from Defendant Culliver a copy of the State of Alabama's protocol for the lethal injection procedure.

22. Defendant Culliver refused to provide counsel for the Plaintiff with same. (See Attachment 2).

23. Furthermore, Defendant Culliver refused to provide any meaningful information concerning the protocol for the lethal injection procedure or for the medical procedure that would have to be implemented to gain venous access to the Plaintiff immediately preceding the execution despite counsel's representation to Defendant Culliver that the Plaintiff had a valid basis for his concerns. (See Attachment 2).

24. It should be noted that counsel for the Plaintiff also contacted Defendant D. O. C. by telephone and then by faxed correspondence to request a copy of Alabama's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to the Plaintiff as a prior to the execution. (See Attachment 4).

25. Defendant D. O. C. denied the request by email message. (See Attachment 5).

26. Defendant Culliver and a prison nurse employed at Holman have met with the Plaintiff on two separate occasions since the Plaintiff's arrival at Holman and have described to the Plaintiff the procedure Defendant Culliver

intends to implement in order to gain venous access prior to the execution.

27. Ironically, this nurse is the same medical personnel referred to in Paragraph 13 above who had to relinquish medical apparatus to the Plaintiff for the Plaintiff to draw his own blood during a routine physical examination.

28. Notably, Defendant Culliver during the first meeting acknowledged to the Plaintiff that the Plaintiff does exhibit compromised veins.

29. Of paramount importance for purposes of this pleading, during that first meeting, Defendant Culliver also informed the Plaintiff that a medical procedure will have to be performed on the Plaintiff prior to the Plaintiff's execution in order for Defendant Culliver to gain venous access.

30. Defendant Culliver furthermore acknowledged to counsel for the Plaintiff that the Plaintiff's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access.

31. Based upon conversations in which counsel for the Plaintiff has engaged with Defendant Culliver and with Defendant D. O. C., counsel for the Plaintiff in good faith submits to this Court that the State of Alabama does not have as part of its lethal injection protocol written medical procedures that comport with contemporary medical standards for gaining venous access in condemned inmates such as the Plaintiff prior to an execution.

32. Furthermore, counsel for the Plaintiff in good faith submits to this Court that Defendant Culliver and

Defendant D. O. C. are designing a medical procedure to be followed as a predicate to the Plaintiff's execution without being qualified to so design such medical procedure.

33. Furthermore, counsel for the Plaintiff in good faith submits to this Court that the State of Alabama is overstepping its authority in attempting to perform medical procedures outside of a medical setting without appropriate medical safeguards in an attempt to carry out the legal procedure of execution.

34. Assuming *arguendo* that this Court finds that it is appropriate for Defendant Culliver and Defendant D. O. C. to design and implement a medical procedure to be performed outside of a suitably equipped medical facility as a predicate to the legal procedure of execution by lethal injection, counsel for the Plaintiff alerts this Court that the procedure as described by Defendant Culliver to the Plaintiff is exceptionally suspect and carries with it a significant risk that the Eighth Amendment's prohibitions against cruel and unusual punishments will be violated by its use.

35. Specifically and as stated above, Defendant Culliver and the aforementioned nurse have met with the Plaintiff together on two separate occasions to describe the medical procedure that Defendant Culliver intends to implement with the Plaintiff to gain venous access.

36. Defendant Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Plaintiff's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution.

37. More recently, however, Defendant Culliver and the nurse informed the Plaintiff that (1) the incision will be approximately two inches in length and will be made either in the Plaintiff's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

38. Logically, if the State of Alabama had a written protocol for the medical procedure necessary to be performed immediately prior to an execution of condemned prisoners with whom peripheral intravenous access was not possible, there would be no discrepancies between Defendant Culliver's descriptions of the procedure to the Plaintiff.

39. Also troublesome is the fact that Defendant Culliver described the procedure to undersigned counsel on October 3, 2003 as basically being that described in Paragraph 31 above – which involves a two inch incision being made in the Plaintiff and a catheter being inserted through the incision into a vein – but also claimed that the procedure would not be a cut-down procedure.

40. According to Dr. Mark Heath, a licensed physician who is a Board Certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons, the procedure described by Defendant Culliver is precisely a cut-down procedure. (See Paragraph 8 of the Affidavit of Mark Heath, M.D., attached to this pleading as Attachment 6).

41. Clearly, Defendant Culliver does not have the requisite knowledge base to be in charge of designing, performing, or overseeing this medical procedure.

42. From the descriptions of the procedure Defendant Culliver has given the Plaintiff and undersigned counsel and based upon a telephone conversation between undersigned counsel Smith and Mr. Andy Redd of the legal department of the Alabama Department of Corrections, undersigned counsel in good faith believes that Defendant Culliver in fact does intend to perform a cut-down procedure on the Plaintiff to gain venous access prior to the Plaintiff's execution by lethal injection.

43. A cut-down procedure is an invasive and barbaric medical procedure which does not comport with the contemporary practice of medical care. (See Paragraphs 21, 22, 23, and 24 of the Affidavit of Mark Heath, M.D.).

44. If the State of Alabama does intend to perform a cut-down procedure, this clearly would constitute cruel and unusual punishment because this medical procedure is invasive, it may give rise to serious medical complications, it involves unnecessary pain and suffering, it involves the mutilation of the Plaintiff's body, and there are better methods available for a qualified physician to perform on the Plaintiff to gain venous access which would comport with contemporary medical care standards. (See Paragraphs 18, 20, 21, 22, 23, and 24 of Affidavit of Mark Heath, M.D.).

45. According to Dr. Mark Heath, a cut-down procedure involves making a series of surgical incisions through the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. (See Paragraph 9 of Affidavit of Mark Heath, M.D.).

46. During a cut-down procedure, blood vessels may have to be closed either by the use of cautery or the use of ligatory suture. (See Paragraph 11 of Affidavit of Mark Heath, M.D.).

47. Furthermore, cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) because otherwise, it would be an extraordinarily disturbing and distressing experience. (See Paragraph 13 of Affidavit of Mark Heath, M.D.).

48. Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

49. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

50. Whenever a cut-down procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

51. The Defendants have not assured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.

52. Furthermore, the Defendants refuse to supply the Plaintiff with any information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.

53. As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (See Paragraph 14 of Affidavit of Mark Heath, M.D.).

54. Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (See Paragraph 15 of Affidavit of Mark Heath, M.D.).

55. Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (See paragraph 16 of Affidavit of Mark Heath, M.D.).

56. Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).

57. In the absence of such a review, *and particularly given Defendant Culliver's refusal to permit such scrutiny*,

there is a complete lack of any reasonable assurance that the medical procedure Defendant Culliver intends to perform on the Plaintiff as a predicate to his execution will be humane. (See Paragraph 17 of affidavit of Mark Heath, M.D.).

58. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[ ] no 'legitimate penological objective'"; prison official may be held liable under Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted).

59. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff does not comport with evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976) and *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

60. The cut-down procedure the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

61. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing alternative methods or altering the procedures employed in the execution process, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.

62. According to Dr. Mark Heath, there is an alternative procedure that the Defendants could utilize in gaining venous access in the Plaintiff that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Defendant Culliver intends to utilize. (See Paragraphs 20, 21, 22, and 23 of Affidavit of Mark Heath, M.D.).

63. This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

64. This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

65. This procedure is less invasive, less painful, faster, cheaper, and safer that [sic] the cut-down procedure. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

66. Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.

67. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting and failing to successfully obtain venous access using this procedure.

68. The Defendants have not articulated a reason for implementing the barbaric cut-down medical procedure on the Plaintiff in lieu of the medical procedure available that meets contemporary standards of medical care.

69. Of great significance and as referenced above, Defendant Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Plaintiff that Defendant Culliver has acknowledged must be performed as a predicate to the legal procedure of execution or the legal procedure of execution by lethal injection.

70. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will be present during the requisite medical procedure and/or the legal procedure of execution by lethal injection.

71. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the medical procedure performed on the Plaintiff and during the execution itself raises issues of constitutional importance.

72. The Defendants are deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Defendants intend to use in the killing of citizens of the State of Alabama.

73. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment.

74. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of execution by lethal injection in the State of Alabama comports with "the

evolving standards of decency which mark the progress of a maturing society". *Trop v. Dulles*, 356 U.S. 86 (1958).

75. For this Court and for the public to determine whether lethal injection execution in the State of Alabama is being humanely administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners.

76. As it stands now, this Court, the public, and the Plaintiff are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency".

77. in order to pass constitutional muster, an independent body – such as this Court or the public – must be allowed to review the State of Alabama's protocol.

78. It should be stressed that there exists a humane method for gaining venous access in the Plaintiff that does not violate the Plaintiff's Eighth Amendment rights, but Defendant Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Plaintiff that does violate the Plaintiff's Eighth Amendment rights.

79. Given the fact that Defendant Culliver has conceded that the Plaintiff's execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to

gain venous access, there exists a substantial risk that the Defendants intend to violate the Eighth Amendment's prohibitions against inflicting cruel and unusual punishments with respect to the Plaintiff.

80. Given the posture that the Defendants have taken regarding the secrecy of the lethal injection protocol and accompanying mandated medical procedures, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Plaintiff.

81. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. *Louisiana ex re. Francis v. Resweber*, 329 U.S. 459 (1947).

82. Failure to provide injunctive relief will result in irreparable harm in that the Defendants will perform the above-described cut-down procedure on the Plaintiff prior to his execution which is scheduled for October 9, 2003 at 6:00 p.m.

CAUSE OF ACTION

COUNT I

Deprivation of Constitutional Rights Under the Eighth Amendment

83. Plaintiff has the right under the Eighth Amendment to the United States Constitution, as applied to states through the Fourteenth Amendment, to be free from cruel and unusual punishments.

84. The actions of the Defendants will result in the deprivation of the Plaintiff's rights as guaranteed by the Eighth Amendment.

State Law Claim

85. By Defendant Culliver refusing to allow a physician to examine and consult with the Plaintiff regarding the likely ability of Defendant Culliver to gain venous access to the Plaintiff as a predicate to the Plaintiff's execution, Defendant Culliver has violated Ala.Code 1975 § 15-18-81.

In Forma Pauperis Status

86. The Plaintiff has been incarcerated since 1978.

87. The Plaintiff previously has been allowed to proceed *in forma pauperis* in the United States District Court for the Northern District of Alabama, the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests that this Court provide the Plaintiff with the following relief:

a. Enter an order allowing the Plaintiff to proceed *in forma pauperis* in this proceeding.

b. Enter an order granting injunctive relief and staying the Plaintiff's execution, which is currently scheduled for October 9, 2003 at 6:00 p.m.;

c. Enter an order that directs the Defendants to provide the Plaintiff with the protocol concerning the medical procedure which will be followed to gain venous access as a predicate to the Plaintiff's execution and the legal procedure of execution by lethal injection;

d. Enter an order that directs the Defendants to consult with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution;

e. Enter an order that directs the Defendants to allow the Plaintiff to meet with his physician pursuant to Ala.Code 1975 § 15-18-81;

f. Enter an order that provides for attorney's fees and costs of litigation under Title 28 of the Federal Code, and 42 U.S.C. 1988; and

g. Such other and further relief as this Court deems just and appropriate.

[SIGNATURES ON THE NEXT PAGE]

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with express permission
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[Certificate Of Service Omitted In Printing]

ATTACHMENT 1

[SEAL]

STATE OF ALABAMA

DEPARTMENT OF CORRECTIONS

DON SIEGELMAN
GOVERNOR

MICHAEL W. HALEY
COMMISSIONER

April 27, 2001

H. Victoria Smith, Esq.
507 The Grant Building
44 Broad Street N.W.
Atlanta GA 30303

Re: David Larry Nelson
AIS #Z-383

Dear Ms. Smith:

This will acknowledge receipt of your FAX of April 26, 2001, and further advise that I have informed Deputies Attorney General Clay Crenshaw and Michael Billingsley of your request. Pursuant to their instruction, we will require a court order to release these records.

If you have any further questions, would you please refer them to Messrs. Crenshaw and Billingsley.

Sincerely,
/s/ William F. Addison
William F. Addison
Assistant General Counsel

WFA/elu

cc: Clay Crenshaw
Michael Billingsley

ATTACHMENT 2

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August 19, 2003

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9677 Highway 21N
Atmore, Alabama 36503

Re: David Larry Nelson, Z-383

Dear Warden Culliver:

Thank you for speaking with me today via telephone regarding Mr. Nelson's pending execution. As I stated during that telephone conversation, I am trying to learn as much as possible about the lethal injection procedures currently in use at your facility so that I may knowledgeably consult with Mr. Nelson regarding his upcoming execution. As we discussed, Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins.

Based on our telephone conversation, it is my understanding that you have a written protocol regarding

execution procedures but are unwilling to provide that protocol to me. Also, you assured me that there will be "medical personnel" present during Mr. Nelson's execution, but you would not divulge any descriptions of the "medical personnel" (e.g., an anesthesiologist, a general practice physician, a registered nurse). You indicated that the "medical personnel" would have received "medical training"; however, you would not tell me anything about that training except that it was "medical" in nature. You would not divulge whether that training included instruction in execution methodology. Finally, you could not tell me anything about the "cutdown" procedure that would have to be implemented if the "medical personnel" could not find good veins on Mr. Nelson's arms.

You did agree to have Mr. Nelson evaluated by a physician once Mr. Nelson was transferred to your facility so that the physician could consult with Mr. Nelson about the difficulties that Mr. Nelson might encounter during the execution, and I thank you for agreeing to do so. As I told you, I am sure that such a consultation would alleviate some of the anxiety that Mr. Nelson is currently experiencing regarding the execution. I am assuming that the physician who examines Mr. Nelson will be allowed to review the protocol for the execution procedure so that he or she may speak intelligently about the procedure with Mr. Nelson.

Please contact me if anything in this correspondence is inaccurate. Thank you again for speaking with me.

Sincerely,

/s/ H. Victoria Smith
H. Victoria Smith

ATTACHMENT 3

* * *

ATTACHMENT 4

[Names and Phone Numbers Omitted In Printing]

October 3, 2003

VIA FACSIMILE TRANSMITTAL

Mr. Andy Redd
Alabama Department of Corrections
Legal Department
101 South Union Street
Montgomery,. Alabama 36130
Fax No. (334) 353-3891

Re: Alabama Lethal Injection Protocol

Dear Mr. Redd:

Pursuant to our telephone Conversation earlier today, please accept this correspondence as my formal request that I be provided with a copy of Alabama's lethal injection protocol. As we discussed, I represent Mr. David Larry Nelson, Z-383, who is scheduled to be executed by lethal injection by the State of Alabama on Thursday, October 9, 2003. Due to years of intravenous drug abuse, Mr. Nelson has severely compromised veins and is concerned about the procedure that the protocol dictates should be implemented in gaining venous access.

If you have any questions about this correspondence or my request, please contact me. Thank you for your assistance in this matter.

Sincerely,

/s/ Victoria Smith
H. Victoria Smith

ATTACHMENT 5

Original Message:

From: Redd, Andrew W ARedd@doc.state.al.us
Date: Fri, 3 Oct 2003 13:52:01-0500
To: hvs@michaelkennedymcintyre.com
Subject: Request for Lethal Injection Protoco [sic]/
David Larry Nelson Z-383

Dear Ms. Smith:

I have received and reviewed your request for a copy of the lethal injection protocol and have conferred with my superiors on this matter. I must inform you that we must deny your request.

Andy Redd
General Counsel
---
mail2web – Check your email from the web at http://mail2wel.com/.

ATTACHMENT 6

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Personally appeared before me, Mark Heath, M.D., who after first being duly sworn stated and affirmed under oath as follows:

1.

My name is Mark Heath, M.D., and I am more than eighteen years of age, *sui juris*, and am competent to give this Affidavit as I have personal knowledge of certain facts relative to the State of Alabama's planned execution of Mr. David Nelson.

2.

I am a physician licensed to practice medicine in the State of New York.

3.

I am a practicing anesthesiologist and am Board Certified in anesthesiology. I am an assistant professor of clinical anesthesiology at Columbia University College of Physicians and Surgeons, and teach I [sic] instruct medical students and residents and fellows in the practice of anesthesiology. My routine practice includes obtaining intravenous access in virtually all of my patients. Additionally, the majority of my patients require the placement of central venous catheters, and I personally supervise or

perform the placement of these catheters. I conduct research in the field of anesthesiology sponsored by the National Institutes of Health and publish in the field of anesthesiology. My curriculum vitae is attached to this Affidavit.

4.

I was contacted by Mr. David Nelson's attorneys regarding their concerns about Mr. Nelson's severely compromised veins and their concern that the State of Alabama's execution team might encounter problems in attempting to gain venous access with Mr. Nelson during the lethal injection execution process.

5.

It is my understanding that gaining peripheral venous access to Mr. Nelson has been difficult during medical procedures conducted on Mr. Nelson in the past by prison personnel.

6.

It is my understanding that the warden who will be in charge of the execution at Mr. Nelson's prison has acknowledged to Mr. Nelson's attorneys that Mr. Nelson's compromised veins will present a novel situation for the State of Alabama's execution team in gaining venous access and will require that team for the first time to conduct a separate medical procedure prior to the execution.

7.

It is my understanding that both the warden of Mr. Nelson's prison and the Alabama Department of Corrections have refused to provide Alabama's written protocol for lethal injection executions to Mr. Nelson or his attorneys. As such, it is unknown by anyone other than those State of Alabama employees authorized to be in possession of the written protocol what procedures, if any, the protocol directs medical personnel to follow upon being presented with a condemned person such as Mr. Nelson with whom peripheral intravenous access is not possible.

8.

It is my understanding that the warden at Mr. Nelson's prison intends to gain venous access immediately preceding the execution by making a surgical incision of approximately two inches in length either in Mr. Nelson's leg or on his arm and inserting a catheter into one [sic] Mr. Nelson's veins through that incision. This procedure is known as a cut-down procedure.

9.

A cut-down procedure involves making a series of surgical incisions though the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached.

10.

A cut-down procedure can be performed on the arm or leg, or in the groin, neck, or chest. Patients who have been

exposed to chronic intravenous chemicals, whether chemotherapy or drugs of abuse, often have severe scarring of the veins in the arms and legs, and cut-downs have to be performed in the neck, chest, or groin.

11.

During the procedure multiple small arteries and veins in the fat and muscle layers are transected and release blood; these blood vessels need to be closed either by the use of cautery or the use of ligatory suture. Tissue needs to be dissected away from the vein, usually using a technique called blunt dissection.

12.

If cautery is used, smoke will rise from the area of the incision and the room will smell of burning tissue, flesh, and blood. Cautery also makes a buzzing and sizzling sound as the water in the blood and tissue boils.

13.

When performed electively, which is quite uncommon (see below), cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain), because it would otherwise be an extraordinarily disturbing and distressing experience.

14.

A cut-down procedure is a surgical procedure that should be performed only by a physician or practitioner

who is specifically trained and credentialed to perform that procedure. Many, or perhaps most, physicians have never personally performed a cut-down procedure. In particular, physicians who have not received postgraduate training in surgery or cardiology or emergency medicine are unlikely to be experienced and proficient in performing this procedure. Therefore, merely stating that a physician will be present at the execution fails to provide any assurance to the condemned prisoner that the procedure will be performed safely and competently.

15.

In the hospital setting medical practitioners are credentialed for specific procedures, including cut-down procedures. This system has been instituted to safeguard patients by ensuring that procedures are performed by experienced and competent personnel.

16.

Regardless of their status in society, no individual should be subjected to a surgical procedure such as a cut-down at the hands of an inexperienced practitioner. Any plan that involves subjecting any person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and a botched outcome.

17.

Any patient or person undergoing an elective cut-down procedure should be entitled to review the credentials, certification, and training record of the person or

persons who will be performing the procedure. In the absence of such a review, and in particular in the presence of a refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the procedure will be humane.

18.

Complications of the cut-down procedure are well-recognized and are described in basic clinical textbooks. These complications include:

(a) Severe hemorrhage (bleeding) – the cut-down procedure involves a deep incision and dissection in the area of large blood vessels. Laceration of these blood vessels may result in bleeding that can obscure the surgical field and make surgical repair difficult. The likelihood of this occurring is increased if the proper equipment is not available. This equipment would include suction, surgical lighting, surgical instruments, and cautery. In the hospital setting a physician is able to quickly summon assistance should a hemorrhagic complication situation arise. There has been no assurance for Mr. Nelson that experienced and competent assistance will be readily available to treat the complication of severe hemorrhage. Death by hemorrhage and exsanguination (the emptying of blood from the body) is extremely distressing. It is accompanied by a sense of asphyxiation and terror, and would be inhumane were it to occur as the result of a deliberate and premeditated act.

(b) Pneumothorax – a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called pneumothorax. This complication involves the entry of air into the potential space

between the lungs and the inner wall of the chest. This complication causes severe distress, including the sensation of suffocation, and if untreated often results in death by asphyxia and cardiovascular collapse. Death by pneumothorax would be agonizing and, if caused by a deliberate and premeditated act, would be inhumane. The treatment of pneumothorax involves the placement of a tube called a "chest tube", which when connected to a source of suction serves to evacuate the air from the space between the lung and the chest wall. Placement of a chest tube requires training and experience. It is likely that the majority of physicians, particularly those who have not completed post graduate surgical training, have never placed a chest tube. Placement of a chest tube also requires the immediate availability of the proper medical equipment and supplies, and the availability of a source of suction.

(c) Cardiac dysrhythmia – a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called cardiac dysrhythmia. This is an abnormality of the electrical activity of the heart which can cause impaired pumping of blood and hemodynamic collapse (also called shock). The cut-down procedure causes this complication because the tip of the catheter can irritate the atrium or ventricle, the chambers of the heart, and trigger abnormal electrical activity. Recognition of this common complication requires the placement of EKG leads prior to performing the procedure, and requires frequent checking of the EKG trace while the catheter is being advanced. Treatment of life threatening dysrhythmias requires the use of the appropriate drugs and/or the use of electrical shocks from a device called a defibrillator.

Failure to prepare for the diagnosis and treatment of the complication of dysrhythmia would place a patient, or anybody undergoing a cut-down procedure in the internal jugular vein or the subclavian vein, at risk of experiencing hemodynamic collapse. This is a terrifying experience that is often accompanied by severe chest pain, nausea, vomiting, and a sense of suffocation or asphyxia.

(d) Pain – because of the invasive nature of the procedure, including blunt and sharp dissection through successive layers of skin, fat, and muscle, a cut-down procedure can be extremely painful. The risk of pain is greatly increased if the procedure is performed by personnel who are not well-experienced in surgical techniques.

19.

The obtaining of central venous access is commonly performed in therapeutic settings throughout the United States and the world.

20.

The cut-down technique is rarely used in the elective surgical setting because it has been supplanted by superior techniques that are safer, less painful, less invasive, faster, cheaper, and easier to perform. In the elective setting, the cut-down technique is now almost exclusively reserved for the placement of cardiac pacemakers and for harvesting veins for coronary surgery. Elective cut-down procedures are performed in fully equipped operating rooms or catheterization labs under deep sedation or general anesthesia.

21.

Given the near universal adoption of superior techniques, there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be.

22.

Given the above-described risks involved with performing a cut-down procedure in an attempt to gain venous access in a patient with whom peripheral intravenous access attempts have failed, such a procedure does not comport with the contemporary practice of medical care and is highly unlikely to be selected and performed by a physician practicing in a therapeutic health care setting.

23.

The contemporary practice of medicine usually employs a hollow needle and a wire to secure central intravenous access. This technique is referred to by several terms, including but not limited to "percutaneous central line placement", "percutaneous central access", "percutaneous central venous cannulation", and "percutaneous technique". This technique has, except in rare circumstances, supplanted the use of the cut-down technique. The percutaneous technique is superior to the cut-down technique in virtually all regards. Compared with the cut-down technique, the percutaneous technique is less invasive, less painful, faster, cheaper, and safer. Because of its more widespread use, far more physicians and health care professionals are proficient and competent in performing

the percutaneous technique. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting, and failing, to successfully obtain intravenous access using the percutaneous technique. In experienced hands the failure rate using the percutaneous technique is extremely low.

24.

Gaining venous access is a medical procedure that is separate from the legal procedure of execution by lethal injection. The State of Alabama's protocol regarding venous access procedures, therefore, should comport with contemporary standards of medical care. To meet contemporary standards of medical care, the protocol should not include a cut-down procedure.

25.

For the reasons described above, in order to approach or meet a medically acceptable standard the execution protocol should explicitly articulate and define the requisite credentials, licensure, training, and experiences of the personnel who are scheduled to secure intravenous access. While such definition should apply to all lethal injection procedures, it should in particular apply to lethal injection procedures in which the establishment of intravenous access is expected and foreseen to be challenging and painful.

SO SAYETH AFFIANT.

/s/ Mark Heath
MARK HEATH

Sworn to and subscribed before me
This 6th day of October, 2003
/s/ Lia Pascale
Notary Public
My commission expires: 7/21/07

Curriculum Vitae

1) Date of preparation: October 6, 2003

2) Name: Mark J. S. Heath
   Birth date: March 28, 1960
   Birth place: New York, NY
   Citizenship: United States, United Kingdom

3) Academic Training:

Harvard University	B.A., Biology, 1983
University of North Carolina, Chapel Hill	M.D., 1987
Medical License	New York: 177101-1

4) Traineeship:

1987–1988	Internship, Internal Medicine, George Washington University Hospital, Washington, D.C.
1988–1991	Residency, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY
1991–1993	Fellowship, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY

5) Board Qualification:

   Diplomate, American Board of Anesthesiology, October 1991.

6) Military Service: None

7) Professional Organizations:

American Society of Anesthesiologists
International Anesthesia Research Society
Society of Cardiovascular Anesthesiology

8) Academic Appointments:

1993–2002	Assistant Professor of Anesthesiology, Columbia University, New York, NY
2002–present	Assistant Professor of Clinical Anesthesiology, Columbia University, New York, NY

9) Hospital/Clinical Appointments:

1993–present	Assistant Attending Anesthesiologist, Presbyterian Hospital, New York, NY.

10) Honors:

Magna cum laude, Harvard University
Alpha Omega Alpha, University of North Carolina at Chapel Hill
First Prize, New York State Society of Anesthesiologists Resident Presentations, 1991

11) Fellowship and Grant Support:

Foundation for Anesthesia Education and Research, Research Starter Grant Award, Principal Investigator, funding 7/92-7/93, $15,000.

Foundation for Anesthesia Education and Research Young Investigator Award, Principal Investigator, funding 7/93-7/96, $70,000.

NIH KO8 "Inducible knockout of the NK1 receptor"
Principal Investigator, KO8 funding 12/98-11/02,
$431,947 over three years
(no-cost extension to continue through 11/30/2002)

NIH RO1 "tachykinin regulation of anxiety and stress responses"
Principal Investigator, funding 9/1/2002-8/30/2007
$1,287,000 over 5 years

12) Departmental and University Committees:

Research Allocation Panel (1996-2001)
Institutional Review Board (Alternate Boards 1-2, full member Board 3)
(2003-present)

13) Teaching:

Lecturer and clinical teacher: Anesthesiology Residency Program, Columbia University and Presbyterian Hospital, New York, NY

Advanced Cardiac Life Support Training

Invited Lecturer:

NK1 receptor functions in pain and neural development, Cornell University December 1994

Anxiety, stress, and the NK1 receptor, University of Chicago, Department of Anesthesia and Critical Care, July 2000

Anesthetic Considerations of LVAD Implantation, University of Chicago, Department of Anesthesia and Critical Care, July 2000

NK1 receptor function in stress and anxiety, St. John's University Department of Medicinal Chemistry, March 2002

Making a brave mouse (and making a mouse brave), Mt. Sinai School of Medicine, May 2002

Anesthetic considerations of LVAD implantation. Recurrent lecture at Columbia University LVAD implantation course.

14) Grant Review Committees: None

15) Publications:

Original peer reviewed articles

* Santarelli, L., Gobbi, G., Debs, P.C., Sibille, E. L., Blier, P., Hen, R., **Heath, M.J.S.** (2001). Genetic and pharmacological disruption of neurokinin 1 receptor function decreases anxiety-related behaviors and increases serotonergic function. **Proc. Nat. Acad. Sci.**, 98(4), 1912-1917.

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* **Heath, M.J.S.**, Lints, T., Lee, C. J., Dodd, J. (1995). Functional expression of the tachykinin NK_1 receptor by floor plate cells in the embryonic rat spinal cord and brainstem. **Journal of Physiology** 486.1, 139-148.

* **Heath, M.J.S.**, Womack M. D., MacDermott, A. B. (1994). Subsance P elevates intracellular calcium in both neurons and glial cells from the dorsal horn of the spinal cord. **Journal of Neurophysiology** 72(3), 1192-1197.

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Kyrozis A., Goldstein P. A., **Heath, M.J.S.**, MacDermott, A. B. (1995). Calcium entry through a subpopulation of AMPA receptors desensitized neighboring NMDA receptors in rat dorsal horn neurons. **Journal of Physiology** 485.2, 373-381.

McGehee, D.S., Aldersberg, M., Liu, K.-P., Hsuing, S., **Heath, M.J.S.**, Tamir, H. (1997). Mechanism of extracellular Ca^{2+}-receptor stimulated hormone release from sheep thyroid parafolicular cells. **Journal of Physiology**: 502,1, 31-44.

Kao, J., Houck, K., Fan, Y., Haehnel, I., Ligutti, S. K., Kayton, M. L., Grikscheit, T., Chabot, J., Nowygrod, R., Greenberg, S., Kuang, W.J., Leung, D. W., Hayward, J. R., Kisiel, W., **Heath, M. J. S.**, Brett, J., Stern, D. (1994). Characterization of a novel tumor-derived cytokine. **Journal of Biological Chemistry** 269, 25106-25119.

Dodd, J., Jahr, C.E., Hamilton, P.N., **Heath, M.J.S.**, Matthew, W.D., Jessell, T.M. (1983). Cytochemical and

physiological properties of sensory and dorsal horn neurons that transmit cutaneous sensation. **Cold Spring Harbor Symposia of Quantitative Biology** 48, 685-695.

Pinsky, D.J., Naka, Y., Liao, H., Oz, M. O., Wagner, D. D., Mayadas, T. N., Johnson, R. C., Hynes, R. O., **Heath, M.J.S.**, Lawson, C.A., Stern, D.M. Hypoxia-induced exocytosis of endothelial cell Weibel-Palade bodies. **Journal of Clinical Investigation** 97(2), 493-500.

Case reports none

Review, chapters, editorials

* **Heath, M.J.S.**, Dickstein, M. L. (2000). Perioperative management of the left ventricular assist device recipient. Prog Cardiovasc Dis.; 43(1): 47-54.

* Dickstein, M.L., Mets B, **Heath M.J.S.** (2000). Anesthetic considerations during left ventricular assist device implantation. Cardiac Assist Devices pp 63-74.

* **Heath, M.J.S.** and Hen, R. (1995). Genetic insights into serotonin function. **Current Biology** 5.9, 997-999.

* **Heath, M.J.S.**, Mathews D. (1990). Care of the Organ Donor. **Anesthesiology Report** 3, 344-348.

* **Heath, M.J.S.**, Basic physiology and pharmacology of the central synapse. (1998) **Anesthesiology Clinics of North America** 15(3), 473-485.

Abstracts

Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Gene targeting of the NK1 receptor blocks stress-evoked induction of c-Fos in the murine locus coeruleus. IARS American-Japan Congress A-15.

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Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Expression of Substance P and NK1 Receptor in the Murine Locus Coeruleus and Dorsal Raphe Nucleus. Anesthesia and Analgesia 93; S-212

Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Expression of Substance P and NK1 Receptor in the Murine Locus Coeruleus and Dorsal Raphe Nucleus. Anesthesia and Analgesia 93; S-212.

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Heath, M.J.S., King, T., Debs, P.C., Davis M., Hen R., Barr G. (2000). NK1 receptor gene disruption alters the development of nociception. Anesthesia and Analgesia; 90; S315.

Heath, M.J.S., Lee, J.H., Debs, P.C., Davis, M. (1997). Delineation of spinal cord glial subpopulations expressing the NK1 receptor. Anesthesiology; 87; 3A; A639.

Heath, M.J.S., MacDermott A.B. (1992). Substance P elevates intracellular calcium in dorsal horn cells with neuronal and glial properties. Society for Neuroscience Abstracts; 18; 123.1.

Heath, M.J.S., Lee C.J., Dodd J. (1994). Ontogeny of NK1 receptor-like immunoreactivity in the rat spinal cord. Society for Neuroscience Abstracts; 20; 115.16.

Heath, M.J.S., Berman M.F. (1991) Isoflurane modulation of calcium channel currents in spinal cord dorsal horn neurons. Anesthesiology 75; 3A; A1037.

IN THE UNITED STATES DISTRICT COURT
FOR
THE MIDDLE DISTRICT OF ALABAMA

DEATH PENALTY CASE

DAVID LARRY NELSON

VS.

CIVAL [sic] ACTION
NO. 03-T-1008-N

DONAL CAMPBELL, et al.

IN-CHAMBERS TELEPHONE CONFERENCE RE: MOTION FOR PRELIMINARY INJUNCTION MOTION FOR TEMPORARY RESTRAINING ORDER MOTION FOR CHANGE OF VENUE MOTION TO DISMISS

* * *

BEFORE:	The Hon. Myron H. Thompson
HEARD AT:	Montgomery, Alabama
HEARD ON:	October 7, 2003
APPEARANCES:	Joe Morgan, Esq. Michael McIntyre, Esq. H. Victoria Smith, Esq. Adam Plant Esq. Michael Billingsley, Esq. Clay Crenshaw, Esq.

* * *

[3] WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HEARD BEFORE THE HON. MYRON H. THOMPSON ON OCTOBER 7, 2003 AT THE UNITED STATES COURTHOUSE IN MONTGOMERY, ALABAMA:

THE COURT: Hello, Counsel? This is Nelson versus Campbell. 03-T-1008-N. This is a death penalty case.

Let me call the list of the attorneys. Representing the petitioner – or plaintiff, I should say, I have is that Mr. Joe Morgan?

MR. MORGAN: Your Honor.

THE COURT: Mr. Michael McIntyre?

MR. McINTYRE: Yes, Your Honor.

THE COURT: Ms. Victoria Smith?

MS. SMITH: Yes, Your Honor.

THE COURT: And representing the defendants are Mr. Billingsley?

MR. BILLINGSLEY: Yes, sir.

THE COURT: And Mr. Crenshaw?

MR. CRENSHAW: Yes, Your Honor, I'm here.

THE COURT: Because time is of the essence here – I believe the execution is set for Thursday at what time?

MR. McINTYRE: It's at six p.m. at you. time on Thursday, Your Honor.

THE COURT: Okay. Because the execution is [4] set for six p.m. on Thursday, time is of the essence.

The first thing I'd like to do is just entertain any motions at this time. I'll entertain any motions from the

plaintiff first. Are you asking for, for instance, a T. R. O., a preliminary injunction, permanent injunction or what?

MR. McINTYRE: Your Honor, we've asked in our prayer that you stay the execution, but I guess our request at this time would be a motion for preliminary injunction and we can put that in writing if we needed to.

THE COURT: Okay. Preliminary injunction. I assume you want a T. R. O., too?

MR. McINTYRE: Yes, sir.

THE COURT: Okay. What's your theory for a T. R. O. and a preliminary injunction?

MR. MCINTYRE: I guess our primary theory is that the State of Alabama is planning a medical procedure which we think violates the Eighth Amendment. Right now they're planning to do that on Thursday. Obviously if that's done, it can't be undone and it will be irreparable harm if it is done.

THE COURT: Okay. Any motions from the defendants?

MR. BILLINGSLEY: We'll be filing a motion [5] to dismiss, and depending on what time we get finished here, we'll probably have it over to the court by about the lunchtime.

THE COURT: Okay. Just a motion to dismiss?

MR. CRENSHAW: Judge, we also plan to file a motion for change of venue, and that most likely will be filed within the hour.

THE COURT: Okay. Well I will consider the motions as pending right now. Why don't you let me know your theory regarding your motion for change of venue.

MR. CRENSHAW: Your Honor, the defendants believe that venue is proper in the Southern District of Alabama pursuant to 13 – to Title 28, section 1391(b)(2). That section states that venue is proper in the district where substantial part of the events or omissions giving rise to the claim occurred.

In this case, the plaintiff is located in Holeman [sic] prison. The warden who is designated by statute as the executioner is located at Holeman [sic] prison. The execution is scheduled to occur at Holeman [sic] prison. The plaintiff's complaint is replete with references to witnesses and facilities that are at Holeman [sic] prison.

So for that reason, the defendants assert [6] that venue is proper in the Southern District. The defendants have to concede that venue may be proper in the middle District because the commissioner does reside here, but as we stated, all of the witnesses, all of the events and activities giving rise to this claim occurred in the Southern District. So the defendants will assert in the motion for change of venue that venue is proper in the Southern District.

THE COURT: What witnesses are in the Southern District, can you identify those for me?

MR. CRENSHAW: Well it would be my understanding that the witnesses would be the warden. I believe there were conversations that took place between the warden and Mr. Nelson. And I believe there could be a witness, a registered nurse, I believe, who is employed by

NaphCare, which is the private medical provider for the prisons, is located at Holeman [sic]. I believe the plaintiff's complaint refers to medical records I believe that are at Holeman [sic].

THE COURT: Who is in charge of making decisions about the release of medical protocol?

MR. CRENSHAW: Regarding the execution, Your Honor?

THE COURT: Yes, mm-hmm.

[7] MR. CRENSHAW: Well, it's my understanding – the protocol, I believe, and Mr. Billingsley is going to address this, but I believe the protocol that is going to be planned for this execution is a little different than the ones that we've had, or the three previous executions that have occurred by lethal injection.

THE COURT: Would you tell me the difference?

MR. BILLINGSLEY: Well, what we're going to provide with our motion to dismiss is we have an affidavit from Warden Culliver where he states that he has contracted with a medical doctor to do the procedure that will be necessary, assuming that Mr. Nelson does have compromised veins and that they cannot get an IV going in the normal fashion. And he states that the doctor has informed him they're going to go through three steps.

The first step would be to try to connect the IV into the the [sic] femoral vein which is a vein in the thigh. And it's my understanding that's similar to an IV stick to anywhere else, it's just in the leg rather than in the arm. We don't have any reason to believe that that wouldn't work. My information is that sometimes it won't work if

the individual is obese, but it's my understanding that Mr. Nelson is a [8] regular size guy. He doesn't have that problem.

But if it doesn't work, then they're going to attempt to do it through a vein in the neck. And, again, that would be the external carotid artery – I mean vein. Again, there is no reason to expect that that wouldn't work. This doctor has informed Warden Culliver that he's done these procedures, I believe his affidavit says, hundreds of times.

At that point if these two for whatever reason procedures didn't work, then they would move to do what had been described as the cutdown procedure, which is to make an incision in the upper arm to obtain a vein that way.

THE COURT: What is the name of this doctor who signed the affidavit?

MR. CRENSHAW: Your Honor, we don't know. I think there should be some confidentiality to that.

THE COURT: Okay. Is the doctor located in Mobile or in the Southern District? Can you at least say that?

MR. CRENSHAW: Your Honor, my understanding is the doctor is located in the Southern District. And I believe Mobile, Your Honor.

THE COURT: Okay. Now the medical personnel who will perform the procedure, are they located in [9] Montgomery, or in the Middle District or in the Southern District?

MR. CRENSHAW: Your Honor, it's my understanding that they're in the Southern District, but I would have to talk to the warden about who was going to be there.

THE COURT: What medical personnel will be there?

MR. CRENSHAW: Yes, Your Honor.

THE COURT: Okay. Is most of the decision-making on this, will most of it be done by the warden, Culliver, or Commissioner Campbell?

MR. CRENSHAW: Your Honor, it's my understanding that the warden and the commissioner are consulting with each other. By statute, of course, the warden is the executioner.

THE COURT: What statute says that?

MR. CRENSHAW: I believe it's section 15-18, and I'm looking for the specific subsection.

MR. McINTYRE: Judge, it's 15-18-82.

THE COURT: Okay. Now I'll hear from the plaintiff as to why the case should not be transferred to the Southern District.

MR. McINTYRE: Well first, Your Honor, as Mr. Crenshaw acknowledges, the commissioner is an [10] appropriate defendant. And under 28 U.S.C. 1391(b)(1), it says a judicial district where any defendant resides, if all defendants reside in the same state is an appropriate venue.

THE COURT: Right. I don't think this is a question of an inappropriate venue. The question is, is the venue more appropriate in the Southern District.

MR. McINTYRE: And let me address that, Your Honor. Judge, this whole case is not about the execution. This whole case is about a medical surgical procedure that the D. O. C. plans to use for the first time before an execution. And our position is if all of the decisions about that are being made in Montgomery. I can't believe for a second that the warden is making medical decisions about how to gain venous access.

And let me just say one other thing, Judge. Originally, the warden had told us that this procedure was going to occur twenty-four hours before the execution. Only on Friday did he inform us, and Mr. Nelson, that it would be performed prior to the execution, I guess within maybe an hour of the execution. It just seems to us that they're making this up as they go along. And if things go – I mean, [11] this is a barbaric procedure.

A cutdown procedure is a barbaric procedure. And if it's not done correctly, things can go wrong very quickly; there will be a lot of pain, suffering, maybe even death. But, you know, what we have tried to do is we simply tried to find out what protocol is and they, of course, have never given us, the protocol.

I'm assuming they have a protocol for this procedure, but I don't even know that for sure. We would certainly think they would have a written protocol for this. But I think significantly this issue has never come up before. They have never had to deal with it before. And certainly in terms of looking out for our client, we want to make sure it's done absolutely as humanely as possible.

THE COURT: Other than the commissioner, who is located in the Middle District of Alabama?

MR. McINTYRE: Judge, I guess in order to answer that question I would need to know exactly what the D. O. C. has been doing to deal with this unique situation. And they have been aware – I mean, maybe they're not going to concede this, but we've been talking to the warden on and off ever since Mr. Nelson was transferred to Holeman [sic]. And everyone has always acknowledged that this was going to be a problem. And [12] the issue was just how can we deal with the problem.

So, I am sure – I mean, I would certainly expect a decision of this magnitude, that it's being made in Montgomery either by medical professionals in Montgomery, certainly by officials of the Department of corrections, but I really think what's happening in Atmore is simply ministerial. But really the decision-making of this is in Montgomery.

Certainly I would expect the protocol was devised and created and promulgated in Montgomery.

THE COURT: What do you have to support that?

MR. McINTYRE: What do I have?

THE COURT: Yes.

MR. McINTYRE: I'm just assuming that, Judge. I don't believe that a protocol for all executions would have been done by a warden of an institution. I mean, I'm assuming that would have been done in Montgomery. And of course we're asking the Court to require them to

disclose the protocol for us to be able to look at the protocol and see what actually is supposed to happen.

I'm assuming that's written down somewhere, and if that protocol doesn't meet the standards of the Eighth Amendment, to change the protocol. That's our request. obviously, for any of that to happen, that [13] would happen in Montgomery. It would not be Warden Culliver.

THE COURT: The document that the defendants say they're going to file this afternoon establishing how the vein will be located, is that the protocol you're seeking?

MR. McINTYRE: Judge – Well, I mean we would like to have the complete protocol concerning lethal injection. Now the reality is, as I just said to you, we are focusing right now on this medical procedure. So if they provided us any and all of the protocol pertaining to that procedure, that would certainly suffice for our request.

THE COURT: Well I understood from what Defense Counsel said that the cutdown would only be used if the other two procedures did not work.

MR. McINTYRE: Well, Your Honor, this is my concern about this, and in some reasons this is why I've become much more concerned about this since we talked to the warden on Friday and he changed his mind about the timing of this.

When the warden was planning to do this twenty-four hours in advance, he assured us, he assured Mr. Nelson, that he had this under control. Now that he has moved it to, say, the hour before the [14] execution – and I'm assuming that this part of the procedure, the execution procedure, will not be public and certainly Mr. Billingsley can

tell me if I'm wrong, but I'm assuming that this is going to be done privatley [sic] without any scrutiny, and they are simply going to be cutting on Mr. Nelson, doing whatever they have to do in order to insert a catheter somewhere.

And that is – there's not going to be any scrutiny of that process. And I think, you know, my concern, Judge, and they can tell us on the phone right now we're going to do this and then we're going to try that and then we're going to have to do this. Like I said, I'm assuming it's pursuant to a written procedure, and I'm assuming a doctor is going to do it. But is this a doctor who is competent to do a cutdown procedure? We can go into great detail about a cutdown procedure in an affidavit from our expert.

This is not a simple procedure, and this is not a procedure that just anybody can do. So, you know, having no details of exactly what they plan to do until Mr. Billingsley just gave us one description, I think anybody who thinks that the normal procedure for finding a vein is going to work is really being very inconsistent with what the warden and the nurse at Holeman [sic] have said from day one ever since [15] Mr. Nelson got there. I don't think that's realistic.

And so, if he's saying, you know, if one and two don't work, then we go to cutdown, I can pretty much assume we're going to cutdown.

THE COURT: Why should we assume that?

MR. McINTYRE: Because everything that the people at Holeman [sic] have told us is that it is going to be extremely difficult to gain venous access with Mr. Nelson.

And if that wasn't the case, none of this would be happening.

MR. CRENSHAW: Your Honor may I respond very briefly?

THE COURT: Go ahead.

MR. CRENSHAW: The problem is, as I understand it, is Mr. Nelson was an IV drug user and he used those drugs in his lower arms and hands. And I think that's the problem in gaining venous access to those areas of his body. And certainly, you know, those problems won't exist if the medical personnel tried to attach a direct line or a direct IV line to other parts of his body.

As far as the written protocol that's going to occur for this particular execution as Mr. Billingsley said, the defendants will be filing the affidavit of Grannt [sic] Culliver with our motion to [16] dismiss, and that outlines that particular protocol. And, again, there's no Constitutional requirement that the prisons use a doctor, and I think there are cases from other jurisdictions where physicians' assistants and even EMTs are being used to do some of these procedures.

But, again, you have to remember that this doctor, as Your Honor has already recognized, is going to just attach the direct line to the femoral vein, which is just an IV stick in a different part of the body is all it is, and for whatever reason if that doesn't work and that's, you know, of course it's expected to work and we're trying to obtain an affidavit from another doctor that talks about how that particular procedure should be successful. And the only time it's not is if the person is obese in the typical kind of situation.

But, again, Your Honor, it said that the second thing that will be tried is to put the IV in the carotid vein – I believe it's the carotid vein – in the neck.

And only the third procedure, I don't now if it's a cutdown procedure or not, but all it is, Your Honor, is a two inch incision and then an IV is attached to the vein. And I believe that vein is in [17] the upper arm.

MR. McINTYRE: Your Honor, can I say something?

MR. CRENSHAW: Your Honor, I'm sorry, can you let me just complete or respond to one other point that Mr. McIntyre made?

As far as the timing of this event, Mr. McIntyre, I think, is attaching significance to that just to try to create some issue for you. And I don't know that the prison could begin the execution, which I think attaching an IV line would be doing that, before our execution warrant is valid. So in my opinion, I don't know that the prison could begin the execution procedure before our warrant begins to run, which would be at twelve on [sic] one a.m. on Thursday.

So, and again, I think that's just an issue that Mr. McIntyre is just trying to bring up to create some controversy here.

THE COURT: Okay. Now that's twelve oh one on Thursday?

MR. McINTYRE [sic]: [MR. CRENSHAW:] Your Honor, our warrant is valid for one twenty-four hour period.

THE COURT: Right.

MR. McINTYRE [sic]: [MR. CRENSHAW:] Even though it's valid for that whole day, as Mr. McIntyre did say, that the [18] execution is scheduled for six p.m.

THE COURT: Okay. I want to get back – You said the warrant is at twelve oh one a.m.?

MR. BILLINGSLEY [sic]: [MR. CRENSHAW:] I'm sorry. I didn't mean to create confusion. Our warrant is valid for a twenty-four hour period, and it begins to run at twelve oh one a.m. on Thursday and expires at eleven fifty-nine p.m. that night.

THE COURT: Oh. Okay.

MR. BILLINGSLEY [sic]: [MR. CRENSHAW:] And the execution is scheduled for six o'clock p.m. on Thursday. My point in that was that in my opinion I don't think the medical personnel at Holeman [sic] could begin the procedure before our execution warrant was valid.

And that's all I have, Your Honor.

THE COURT: Okay. I'd like the defendants to get to me the location of the medical personnel who will perform the procedure.

MR. CRENSHAW: Yes, Your Honor.

THE COURT: Go go ahead. Who is speaking now?

MR. McINTYRE: Michael McIntyre, Your Honor.

THE COURT: Go ahead.

MR. McINTYRE: Your Honor, in terms of, I mean I understand what Mr. Crenshaw is saying that if [19] their window doesn't start until twelve oh one, this is not something that came from me. The fact that they were

planning to insert the catheter twenty-four hours before the execution was totally from the warden. That's what he told Mr. Nelson, that's what he told us. And so that did not come from me. That's not me making anything up, and Mr. Crenshaw can talk to the warden about that if he thinks I'm making that up.

But more importantly, judge, what we're doing here, and it sounds like maybe the state is going to submit affidavits in their pleading from people who have never even seen Mr. Nelson. When we called Warden Culliver before Mr. Nelson was transferred, we asked him – I think this is confirmed in a letter in our pleadings – we asked him would he please have a doctor examine Mr. Nelson so we could determine the extent of the problem. So we could, as his lawyers, so we could determine if there is really going to be a problem or is it not going to be a problem.

The warden said he would let Mr. Nelson be seen by a physician. That never happened. We have our own physician who we wanted to see Mr. Nelson. The warden would not allow that to happen. We asked [20] the warden if he would let our doctor talk to the nurse who was dealing with this at the institution. He wouldn't let that happen. We asked the warden if he would let our doctor talk to his doctor. He wouldn't let that happen.

You know, if the state would like to have their own expert go in and evaluate Mr. Nelson, that would be fine with me. I'd like for our person to see him too. But, you know, I don't think we should speculate, we shouldn't speculate based upon standard operating procedures about what's going to happen. What should have happened was when Mr. Nelson got to Holeman [sic], he should have been evaluated by a competent qualified physician, and

that person should have said this is how we can do this. And then we wouldn't be having this guesswork at the end of the day.

I mean, to do this procedure, which is very complicated, which is totally uncertain right now, just before the execution, seems to me to be a total disaster. And I think cruel and unusual. But I don't think that the court should be in a position of merely speculating what Mr. Nelson's venous situation is. I mean, that's something that could be determined and then we could know exactly what's going to have to happen.

[21] THE COURT: Okay. Now the only question that's before me now is the venue issue, not the merits.

I want to move on, however, to the motion to dismiss that the defendants have announced to the court. What's the basis of that motion? Who will speak for the defendants?

MR. BILLINGSLEY: This is Michael Billingsley, Your Honor. There is really two bases and they're separated into one being the federal claim and one being the state claim regarding the state statute. We're going to assert, or are asserting, Your Honor, that the court does not have jurisdiction to consider the complaint and would move for dismissal on that ground.

The first ground regarding the federal claim is that this claim is attacking the constitutionality of Alabama's method of execution and, therefore, should have been – or should be construed as a habeas petition and is subject to the rules governing second and successive habeas petitions.

We think there is Eleventh Circuit law that's controlling on this question, and those cases will be cited in the state's motion. But to just mention a couple of them, Hill v. Hopper is a case [22] where an inmate challenges the Constitutionality via electrocution in the District Court, and I believe it was Your Honor that dismissed it as being the functional equivalent of a second habeas petition. And that was upheld by the Eleventh Circuit.

More recently, a case styled Fugate v. Department of Corrections, the cite is 301 Federal 3d. 1287 was a claim from Georgia regarding lethal injection, and the District Court dismissed, and I'll quote from the opinion, the complaint was that – Excuse me.

They asked the District Court to injoin [sic] and restrain the defendants from executing him until they take certain measures to minimize the risk of unnecessary pain, suffering and mutilation during the execution process. That's the end of the quote. And we think that's exactly what they're asking for here. And the Court stated that that should be construed as a habeas petition and, therefore, is subject to the rules governing successive petitions. And because they didn't go to the Eleventh Circuit and get permission to file a second habeas petition, the District Court did not have jurisdiction to consider the complaint.

On the claim regarding the state statute, we [23] think that the court is prohibited from exercising jurisdiction by the Eleventh Amendment, and as construed in the Penhurst case. And can I go into that in the more detail now, or –

THE COURT: I'm aware of that.

MR. BILLINGSLEY: Okay. Well that's the basis for the state law claim.

THE COURT: I have a couple of questions for you, Mr. McIntyre. Will you be addressing this, Mr. McIntyre?

MR. McINTYRE: Yes, sir.

THE COURT: Okay. I have a couple of questions before we move into the merits of the dismissal motion.

Has Mr. Nelson exhausted all available habeas corpus relief, Mr. McIntyre?

MR. McINTYRE: Yes, I believe he has, Your Honor.

THE COURT: Okay. So he's been through the federal system and the state system at least once.

MR. McINTYRE: That's correct.

THE COURT: So in order for him to file another habeas petition, he would have to get permission from the Eleventh Circuit as a successive petition, is that correct?

[24] MR. McINTYRE: Yes. if this was a successive 2254, we would certainly have to get permission.

THE COURT: Okay. When was Mr. Nelson aware of the possibility that the cutdown procedure could be used?

MR. McINTYRE: Judge, I would say it was probably – and, Victoria, you can correct me if I'm wrong – but I would say it was probably sometime within the last thirty to forty days.

THE COURT: Why have you waited until now?

MR. McINTYRE: Well, I think what we have done, Judge, is when he expressed a concern about this it really didn't become ripe until he got to Holeman [sic]. And if you look at the attachments to our pleadings, we have done everything we could to try to assure him and assure us that this was going to be a procedure that the warden had under control, as he said, and it was going to be done as humanely as possible. And I think that as events transpired as of last week, the end of last week, we determined that it just seemed like the warden was making it up as he was going along.

And as I said before, a huge concern of Mr. Nelson's was that he thought the procedure was [25] going to be done twenty-four hours in advance and, therefore, it would be scrutinized. He had visitations scheduled for Thursday before his execution. He certainly didn't think the State of Alabama was going to butcher him and then send him out to the visitation room.

But all of a sudden out of nowhere the warden changed the rules on Friday. And this caused us terrible concern and Mr. Nelson terrible concern because now there will be no scrutiny of this procedure. And we won't know how many times they had to cut on him or where they had to cut on him.

I think that would be our main answer to that, Your Honor.

MR. McINTYRE: Judge, can I just say one other thing?

THE COURT: Yes.

MR. McINTYRE: I would like to think that the court looks at our pleadings and realizes how much time we have spent either talking with people in the Department of Corrections or Warden Culliver, I hope the Court will realize that what we have been trying to do is deal with a very unique situation under very difficult circumstances. And as I said before, I have never had a client with this issue. I don't think the [26] State of Alabama has ever had an inmate who was scheduled for execution with this issue.

And I'm not a doctor, and so, you know, this has been sort of a learning process for me in terms of understanding the procedures, understanding Mr. Nelson's condition, and we have been trying to handle this as responsibly as we could in representing Mr. Nelson's interests.

MR. BILLINGSLEY: Your Honor, I could just –

THE COURT: Just a minute, Mr. Billingsley, I'm not quite through with Mr. McIntyre yet. Just hold your point.

Mr. McIntyre, how am I going to get around – and I use "get around" with some seriousness – the Fugate and the Hill vs. Hopper cases?

MR. McINTYRE: Well, judge, I understand your concern in that regard, but I think this is truly, and I haven't had time to research this nationwide, but I think the difference between the cases that have been cited and our case is that we are not challenging how they plan to execute Mr. Nelson.

THE COURT: I don't understand how you are not challenging –

MR. McINTYRE: Well, judge, I think the only [27] realistic way to look at this is that in Mr. Nelson's unique situation there are truly two procedures that are required in order to execute him by lethal injection. The first – And I think the best evidence of that is that the warden originally was going to do the first medical procedural [sic] on Wednesday. I mean that is a separate surgical medical procedure that has to be conducted on people who have compromised veins.

So our position is there are two procedures that have to occur, and I think at least Warden Culliver has viewed this the same way. We are not challenging the legal [sic] injection. We are not challenging anything about the legal [sic] injection. We are challenging this procedure that allows them to gain venous access. And we're not saying that there are not any conditions under which they can get venous access. we're saying just the opposite.

There are ways to get it that don't violate the Eighth Amendment. But we believe, of course we don't have the [sic] their protocol, that their methods violate the Eighth Amendment. And if you look, Judge – And so the question is if you said is this just a 2254 in a 1983 closing [sic], or is this a true 1983. And I would say in this situation with these two distinct procedures, we're not challenging lethal injection, [28] we're not challenging the execution, we're challenging the separate medical procedure. And, Judge, if you look at –

THE COURT: How do you get around Fugate where the court says a complaint seeking to prohibit state officials from executing the plaintiff until they take measures to minimize the risk of unnecessary pain, suffering

and mutilation during the execution should be considered a habeas petition?

MR. McINTYRE: Well, Judge, I don't want you to think I'm splitting hairs, but I mean I don't think we're talking about the execution. We're talking about the procedure prior to the execution.

THE COURT: Okay. How can you separate this procedure from the execution? Without the execution, this procedure isn't necessary. Why isn't it a part of the execution procedure?

MR. McINTYRE: Well, I think it's certainly, Your Honor, a condition precedent of the lethal injection, but it's not one and the same. And if you look at the same line of cases, you know, Hill and Spivey – I mean Hill and Fugate, if you look at Spivey vs. State Board of Pardons and Paroles, which is also out of Georgia which is 279 F.3d 1310, they referred to "in determining whether a claim is [29] recognizable under 1983, a court must ask whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or his sentence." And that is simply not the case here.

THE COURT: But in those earlier cases I thought the issue was whether a judgment in favor of the plaintiff would stay the execution. And I thought that's exactly what you're asking here.

MR. McINTYRE: Judge, that is what we're asking for.

THE COURT: And because the manner of execution ultimately, you're saying, would violate the Eighth Amendment.

MR. McINTYRE: No, Your Honor. What I'm saying is the manner of execution in Mr. Nelson's case is lethal injection, and we are not challenging that in any way whatsoever. But what we are challenging is how the State of Alabama at the present time intends to to [sic] have venous access on Mr. Nelson.

THE COURT: What are the standards for getting a successive petition, filing a successive petition?

MR. McINTYRE: Judge, I think it's – well, let's see here. Judge, I think, and like I said don't hold me to this strictly, but I believe it's under 28 [30] U.S.C. 2244, and it deals with, you know, new rules of Constitutional law, factual predicates that couldn't have been discovered previously. I mean, Judge, obviously I'd like to get the state's pleading and see what they say and respond to it in writing, but –

THE COURT: Why couldn't arguably this fall under a factual predicate that wasn't discovered earlier?

MR. McINTYRE: Well, Judge, I think, and I don't now if you're looking at the statute –

THE COURT: I'm not.

Mr. McINTYRE: I believe – and like I said I don't want to talk myself out of a position here, but let me just address what you just said. Obviously, the factual predicate for this was not available to Mr. Nelson until very recently.

THE COURT: Right.

MR. McINTYRE: The problem is, I don't think that's the only part of the standard.

THE COURT: Okay. Do you ever [sic] the standard before you?

MR. McINTYRE: Yes.

THE COURT: Okay. What's the other part of the standard? If you know.

MR. McINTYRE: (b)(1), Judge, says, this is [31] the (b)(1), the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and then small two, the facts underlying the claim if proven and viewed with the evidence as a whole, be sufficient to established [sic] by clear and convincing evidence that but for the Constitution [sic] error no reasonable find [sic] finder would have found the applicant guilty of the underlying offense.

And obviously, Your Honor, I mean our claim does not have anything to do with factual innocence. But, judge –

THE COURT: Now is there anything else you wanted to add, Mr. McIntyre?

MR. McINTYRE: I just wanted to say, Judge, that I haven't found a case in the Eleventh Circuit on this issue that is similar to our case in terms of having a procedure prior to the execution, that if you successfully – if we are successful in our challenge, all it's going to do is to provide Mr. Nelson with a procedure prior to his execution that meets the Eighth Amendment. That's it. It's not going to stop his execution, and we're not asking ultimately for his execution to be stopped in this suit.

THE COURT: Okay. Let's address your state [32] law claim. Doesn't Penhurst pretty much foreclose that claim?

MR. McINTYRE: Judge, I would need to look at Penhurst.

THE COURT: Well Penhurst essentially says that federal courts cannot order state officials to comply with state law. You need to go to a state court to do that.

MR. McINTYRE: Judge, I think if that is what Penhurst says, if we had to, you know, we could dismiss that claim and rely sole [sic] on our federal claim.

THE COURT: Let me assure you that's exactly what it says.

MR. McINTYRE: Okay, I wasn't questions [sic] you.

THE COURT: And I don't think I can hear your state law claim. I think you need to be in state court on that. I can say that with confidences [sic].

MR. McINTYRE: Obviously, Judge, that is a very minor part of this suit.

THE COURT: Well whether it's a minor part or not, I cannot entertain it under a 1983 action. So if you want to pursue that claim, you need to file your claim in state court forthwith, I can summarily dismiss that since it's under the Eleventh Amendment.

But let's get back to the habeas issues. So [33] you're saying that under 2244, you can't challenge a last minute claim of cruel and unusual punishment in the manner of execution, assuming those facts did not arise until the last minute. That's your concern, Mr. McIntyre?

MR. McINTYRE: Judge, I'm sorry, would you say it one more time?

THE COURT: Is your concern that you might not be able to raise an Eighth Amendment claim to the manner of execution even if those facts that give rise to the claim did not arise until the last minute?

MR. McINTYRE: Yes.

THE COURT: As long as you were subject to a successive petition rule.

MR. McINTYRE: Yes.

THE COURT: Okay. I'll hear from the defendants now again, if they would like to add any further argument on their habeas question. I should say the motion to dismiss.

MR. BILLINGSLEY: I wanted to respond to your question about when the factual basis for the claim was known. If you look at Attachment 2 to the complaint, there's some correspondence from the counsel for Nelson which reflects that on August 19th they were aware not only of the possibility of a [34] cutdown procedure and the problems that may be caused by compromised veins, but they were also aware that the warden would not be willing to release information regarding the protocol or the medical personnel that would be present. So they were aware of those things on August 19th.

Just real briefly on the habeas versus 1983 question, I think Fugate again forecloses their claim. I mean this is exactly what they're asking for. The same thing that the court described there. And the Court in that case also went on to say that it wouldn't be acceptable as a habeas petition in other words, it wouldn't qualify for the exceptions to file a second successive habeas petition. So I don't think there is a question that it has to be one or the other. I

mean in that case it was neither. In this case it may be neither as well.

MR. CRENSHAW: Judge, also as further authority the Provenzano case decided by the Eleventh Circuit, 215 F.3d 233. Now that particular claim wasn't raised as a 1983 lawsuit, and it was raised as a habeas petition and the Eleventh Circuit didn't allow it because it didn't satisfy the provisions under 2244. But I think like Fugate and Provenzano, the facts of that case was dealing – or in Provenzano [35] rather, the facts of that case was dealing with the previous execution where, you know, one of the so-called cutdown procedures did occur. And, again, in Provenzano the Eleventh Circuit said – or they dismissed the lawsuit.

THE COURT: Is there any likelihood that you lawyers could get together and agree on a procedure that would be acceptable to both sides for the location of the vein?

MR. McINTYRE: I would certainly be open to that.

MR. CRENSHAW: Your Honor, I think we've outlined the protocol here. I don't know if Mr. McIntyre wants to suggest a different one, but –

THE COURT: Has he seen your affidavit yet from your doctor, or whomever is submitting the affidavit this be [sic] afternoon?

MR. CRENSHAW: Your Honor, no, sir, he has not. And if this affidavit is executed, we certainly have no problem in faxing him that affidavit immediately after we end this phone call.

THE COURT: Why don't you fax it to me, as well.

MR. CRENSHAW: Your Honor, we will certainly do that.

[36] THE COURT: Right. I'll let me [sic] law clerk give you the fax number after we finish.

MR. McINTYRE: Your Honor, Can I say one thing?

THE COURT: Yes.

MR. McINTYRE: I think your last question is sort of an indication of why this isn't merely a successive habeas, is because if we were trying to stop the execution, there isn't any way for me to sit down with Mr. Crenshaw and discuss anything. He wants to execute him, I don't want him to. That's not the case in this situation.

I mean, we are truly trying to get an honest assessment of Mr. Nelson's venous situation, and we just want to do what we can do so that the procedure before they lethally inject him so that that procedure is as humane as it can be under current medical procedures.

And, judge, lots of people out there in the free world have problems where they have vein problems and they need to have access to a vein, or for example, let's say cancer patients on chemotherapy, there are procedures out there that are done by people I'm sure, doctors every day, where that access is done just in the best way possible. And that's all we're [37] trying to do. We are not trying to stop it.

MR. CRENSHAW: Your Honor, one brief point for whatever this is worth. Some of what Mr. McIntyre is saying is confusing to me about sending a doctor in earlier than the execution, because I don't know if he's suggesting that if somebody actually do an IV stick several days before the execution to see if that will work. I mean even if a doctor evaluated Nelson at this point, and looked at his thigh say, for example, until you actually try to attach an IV to Mr. Nelson's body you don't know whether that's going to work or not.

So some of what Mr. McIntyre is saying is a little confusing. But of course as we will outline in the affidavit, we do set out the protocol that the doctor is going to administer.

THE COURT: And this affidavit is by Culliver?

MR. CRENSHAW: Yes, sir, it's based upon Culliver's two telephone conversations with this doctor.

THE COURT: Okay is this doctor going to be present at the procedure? I can't remember.

MR. CRENSHAW: Yes, sir, definitely. The doctor is the medical person who is going to be [38] attaching the direct line to Nelson.

THE COURT: Has this doctor reviewed Mr. Culliver's affidavit?

MR. CRENSHAW: No, sir, he's not.

THE COURT: Is the doctor available right now?

MR. CRENSHAW: Your Honor, I don't know the identity of this person. It's my understanding that Culliver

and the doctor are going to meet face-to-face today at the prison.

THE COURT: Okay. I'd like some verification before noon, either through Mr. Culliver or the doctor, that the doctor has verified everything in the affidavit.

MR. CRENSHAW: Yes, Your Honor. I will try to do that.

THE COURT: Okay.

MR. CRENSHAW: Your Honor, I believe the warden may be out-of-pocket until noon, but I'll try my best.

THE COURT: Okay. Anything else, counsel?

MS. SMITH: Your Honor, one thing that's very important, I think, from our side is that it doesn't – according to the expert that we've been consulting with, cutdown procedures and this kind of [39] venous access requires specialized training. And so to say there's going to be a doctor there, that's better than what we've gotten so far because basically Culliver has just said I'm not going to tell you if it's going to be a nurse, a doctor or whoever. So we're happy there's going to be a doctor there.

But we would also have concerns as to what training and credentials the doctor that is going to be in charge of this has. And we would also have some concerns about what medical apparatus and equipment would be available if, you know, GOD forbid, something goes wrong. Because, of course our expert has alerted us to many things that go wrong in a proper medical setting in a hospital. And so now we're not even in a hospital, we're in a prison. So I guess we would also have those concerns.

THE COURT: Right. Well, when will your motions be filed? You said within the next hour on the motion for venue and by noon on the motion to dismiss?

MR. CRENSHAW: Yes, Your Honor, on the motion for change of venue which is what I have been working on, you've added a few things which you need to know, so that may delay me. I think I had originally told you within the hour, but I need to [40] obtain the information that you've requested.

THE COURT: Okay. I'd like all your motions filed by no later than noon, because I'd like to get a ruling out by two this afternoon.

And the transcript of this proceeding will be made immediately after this conference call, and we can get that to the Eleventh Circuit right now. I believe our court clerk is faxing everything that you all filed with the Eleventh Circuit.

So if I can get a ruling by two o'clock, hopefully that can get to the Eleventh Circuit shortly after two o'clock.

I assume you all have given your fax numbers and phone numbers to the court personnel so you can be informed of my ruling at two o'clock?

MR. BILLINGSLEY: I have not, Your Honor.

THE COURT: Okay, I'm going to leave all of you on the line, and Ms. Carnes will get all of your fax numbers, telephone numbers, and you'll also get my fax number so that you all can be informed at two o'clock.

MR. McINTYRE: Judge, can I ask you one question?

THE COURT: Yes.

MR. McINTYRE: If we want to, can we file a [41] reply to their motions within whatever time you want to set for us?

THE COURT: Yes. If they're going to have them in by noon, you need to have something to me by one.

MR. McINTYRE: This is all central daylight time, right?

THE COURT: Yes, this is my time. And you can fax those directly to chambers.

Very good, stay on the line and Ms. Carnes will get all your numbers and so forth and give you my fax number.

MR. McINTYRE: Thank you, Your Honor.

THE COURT: Thank you.

* * *

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter as prepared by me to the best of my ability.

I further certify that I am not related to any of the parties hereto, nor their counsel, and I have no interest in the outcome of said cause.

Dated this 7th day of October 2003.

MITCHELL P. REISNER, CM, CRR, official US Dist. Court Reporter Registered Professional Reporter Certified Real-Time Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON,)
Plaintiff,)
v.) Civil Action No. _____
DONEL [sic] CAMPBELL, and GRANTT CULLIVER.)
Defendants.)

MOTION TO DISMISS

COMES NOW the defendants, by and through the Attorney General for the State of Alabama, and move this Court to dismiss Nelson's complaint, filed under 42 U.S.C. § 1983. More specifically, Nelson's complaint is due to be dismissed in accordance with Rule 12(b)(1) and (6), F.R.Civ.P. In support of this motion, the defendants submit the following:

PARTIES

The Plaintiff, David Larry Nelson, is currently incarcerated on Alabama's Death Row in Holman Prison, Atmore, Alabama, awaiting his execution, which is scheduled for 6:00 p.m. central time on October 9, 2003.

Plaintiff has named the following Defendants: a) Donal Campbell, Commissioner of the Alabama Department of Corrections, in his official capacity; and b) Grantt Culliver, Warden of William C. Holman Correctional Facility, in his official capacity.

INTRODUCTION

For more than twenty years, David Larry Nelson has been on Alabama's death row for the 1978 murder of Wilson W. Thompson. Nelson received his death sentence after being convicted of "murder committed by a defendant who has been previously convicted of murder in the first or second degree in the 20 years preceding the crime." Ala. Code § 13A-5-40(a)(10) (1975). Nelson exhausted all of his state and federal court appeals when the Supreme Court of the United States, on March 24, 2003, denied his petition for a writ of certiorari from the decision of the Eleventh Circuit Court of Appeals, affirming the dismissal of his habeas petition. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), cert. denied, 123 S. Ct. 1573 (2002).

On April 4, 2003, the State of Alabama moved the Alabama Supreme Court to set an execution date for Nelson. Shortly thereafter, counsel for the State received a letter from Nelson in which he represented that his attorneys would not respond to the motion nor "seek a stay of execution [on his] behalf." (See attached correspondence from Nelson) He additionally requested that any possible steps be taken to insure that an execution date was set expeditiously. (Id.) On September 3, 2003, the Alabama Supreme Court set Nelson's execution for October 9, 2003.

More than two weeks before the issuance of the death warrant, counsel for Nelson expressed concerns to Warden Culliver "about the lethal injection procedure due to the fact that he [Nelson] has severely compromised veins." ("Attachment 2" to Nelson's complaint). Additionally expressed by counsel was an understanding that Warden Culliver would not provide a "written protocol regarding execution procedures" or any information regarding the

personnel who would be carrying out the execution. (Id.) Thus, despite being aware of the basis for the current claim more than two weeks before an execution date was even set, Nelson waited until three days before his scheduled execution to file his complaint.

This Court does not have subject matter jurisdiction over either of Nelson's claims. First, Nelson's claim challenging the constitutionality of the manner in which his execution is to be carried out is the "functional equivalent" of a second habeas petition and, therefore, is "subject to the law applicable to successive habeas petitions." *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997). This Court "lack[s] jurisdiction to consider [Nelson's] request for relief because [Nelson] ha[s] not applied to [the Court of Appeals] for permission to file a second habeas petition." *Id.*

Second, the Eleventh Amendment to the United States Constitution prohibits this Court from exercising jurisdiction over Nelson's "state law claim." Nelson seeks relief on the basis that Warden Culliver, a state official, has failed to comply with Section 15-18-81 of the Code of Alabama (1975). (See Nelson's complaint at p. 18) The Supreme Court for the United States has, however, unequivocally held that the Eleventh Amendment bars a federal court from instructing state officials on how to follow state law. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (stating that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law" and holding that

"[s]uch a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment").[1]

Because this Court is prohibited from exercising jurisdiction of Nelson's complaint, dismissal is required under Rule 12(b)(1) of the Federal Rules of Civil Procedure. For this reason, and those that follow, the defendants respectfully request that this Court grant this motion to dismiss.

ARGUMENT

I. This Court Does Not Have Jurisdiction to Consider Nelson's Claim that Alabama's Method of Execution Will Deprive Him of His Rights Guaranteed by the Eighth Amendment.

Nelson's complaint, purportedly brought pursuant to 42 U.S.C. § 1983, seeks to obtain relief from this Court "enjoin[ing] and restrain[ing] the defendants from executing him until they take certain measure to minimize the risk of unnecessary pain, suffering and mutilation during the execution process." *Fugate v. Department of Corrections*, 301 F.3d 1287, 1288 (11th Cir. 2002). Because this complaint "constitutes the functional equivalent of a second habeas petition, . . . [this] court lack[s] jurisdiction to consider [Nelson]'s claim because he ha[s] not applied . . . for permission ot [sic] file a successive application." *Id.* at 1288 (internal citations and quotation marks omitted),

[1] This claim was summarily dismissed by the Court during the telephone conference held on the morning of October 7, 2003. It is, therefore, not addressed any further in this motion.

citing 28 U.S.C. 2244(b)(3)(A). Nelson's complaint must, therefore, be dismissed.

In *Felker v. Trupin* [sic], 101 F.3d 95 (11th Cir. 1996), the Eleventh Circuit Court of Appeals held that a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim. Like Nelson's challenge to the method of execution to be employed in carrying out his sentence, the plaintiffs, in *Felker*, challenged the constitutionality of Georgia's method of execution on Eighth Amendment grounds. *Id.* at 96.[2] The Court, "[g]uided by *Gomez v. United States District Court*, 503 U.S. 653 (1992), as interpreted by *Lonchar v. Thomas*, 517 U.S. 314 (1996), . . . conclude[d] that [the] § 1983 claim [was] subject to the procedural requirements for bringing a second or successive habeas claim." *Id.* On that basis, the Court determined that "the district court was without authority to consider [the] request for relief." *Id.*; see also *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) ("As Hill's § 1983 cruel and unusual punishment claim constitutes the 'functional equivalent' of a second habeas petition, the district court was subject to the law applicable to successive habeas petitions."), citing *Felker*, 101 F.3d at 96.

[2] Contrary to Nelson's representations, he is challenging Alabama's method of execution. Admittedly, his status as an intravenous drug user may require the State to employ additionally [sic] procedures than those that would otherwise be required. (See attached affidavit of Warden Culliver) Those procedures are, however, part of the method of execution. Nelson's challenge to their potential use, therefore, is a challenge to the execution itself. His claim is, moreover, indistinguishable from that considered in *Fugate*.

Other circuits have resolved this issue in a manner consistent with the opinions above. For example, in *Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997), the Eighth Circuit Court of Appeals consider [sic] a complaint, brought under § 1983, "challenging the constitutionality of death by electrocution in general and, more specifically, the constitutionality of the particular method by which Nebraska allegedly administers the electrical current for electrocutions." The claim was rejected on the basis that "the district court correctly determined that Williams' current complaint is the functional equivalent of a successive habeas action, regardless of its technical label." *Id.* at 336.

Additionally, in *McQueen v. Patton (In re Sapp)*, 118 F.3d 460 (6th Cir. 1997), the Sixth Circuit Court of Appeals rejected a § 1983 "claim[ ] that Kentucky's use of electrocution to carry out a death sentence constitutes cruel and unusual punishment." The Court noted that "[a]lthough McQueen claims that he is not challenging the constitutionality of the death penalty itself but only 'a condition of confinement,' we believe that this challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." *Id.* at 462. The Court "follow[ed] the clear holding of *Gomez*, as endorsed by the Eleventh Circuit, that a challenge to the method of execution, whatever denominated . . . is to be treated as a habeas petition." *Id.* at 464.

Based upon the foregoing authorities, Nelson's complaint must be treated as the "functional equivalent" [sic] a second habeas petition. "Because [Nelson] failed to apply for permission to file a second habeas petition as required

by 28 U.S.C. § 2244(b)(3)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, tit. I (1996), [this Court is] without authority to consider their request for relief." *Felker*, 101 F.3d at 96.

Finally, based on the decision of the United States Supreme Court in *Gomez v. United States District Court*, 503 U.S. 653 (1992), Nelson's complaint is due to be dismissed regardless of "[w]hether his claim is framed as a habeas petition or as a § 1983 action." *Id.* at 654. In either case, Nelson seeks an "equitable remedy" and

> Equity must take into consideration the State's strong interest in proceeding with its judgment and [the petitioner's] obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Id. at 654; see also *Lonchar v. Thomas* 517 U.S. 884 (1996) (explaining *Gomez* as holding that the habeas rules do apply to a last minute § 1983 method of execution claim).

II. Alternatively, Nelson's Claim Should be Dismissed For Failure to State A Claim Upon Which Relief Can be Granted.

Alternatively, Nelson has failed to state a claim upon which relief may be granted. His complaint is based primarily, if not entirely, on the assumption that the State will be employing a "barbaric cut-down medial [sic] procedure." (Nelson's complaint at p. 14) The affidavits submitted

along with this motion to dismiss, however, demonstrate that such is not the case. Instead, a physician will be present and responsible for connecting a direct intravenous line to Nelson. (Affidavit of Warden Culliver) He will first attempt to connect the IV to the femoral vein located in the thigh and if, for some reason, this is unsuccessful, he will attach a direct intravenous line to the external carotid vein located in the neck. (Id.) The doctor has successfully used these procedures for locating a vein hundreds of times in the past. (Id.) Additionally, according to the attached affidavit of Dr. Marc Sonnier, these particular procedures have a high rate of success and cause minimal pain to the affected individual. (Attached affidavit of Dr. Marc Sonnier) Should a "cut-down" become necessary, moreover, Dr. Sonnier, who has employed such a procedure 8-10 times in the past, provides a description and states that any pain would be minimal due to the use of a local anesthetic

Finally, summary dismissal is appropriate here because plaintiff has failed to provide evidence that the defendants are "deliberately indifferent" to the risks associated with carrying out a death sentence by lethal injection, even under these circumstances. See *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that an Eighth Amendment violation occurs only [sic] the deprivation alleged is, objectively, "sufficiently serious" and the official acts with "deliberate indifference" to inmate health or safety).

CONCLUSION

For the foregoing reasons, this Court is due to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the *Federal Rules of Civil Procedure*.

Respectfully submitted,

Bill Pryor
Alabama Attorney General

BY –

/s/ J. Clayton Crenshaw
J. Clayton Crenshaw
Assistant Attorney General

/s/ Michael B. Billingsley
Michael B. Billingsley
Deputy Solicitor General

[Certificate Of Service Omitted In Printing]

Date: 5-20-03

Re: Motion To Set Execution Date:

Dear Mr. Billingsley:

I am writing this letter in regards to your, Motion To Set An Execution Date, which you filed with the Alabama Supreme Court on April 4th 2003.

Pursuant to reviewing the motion. I feel it is only fair that I bring to your attention that you have misstated the

facts of the case and printed several untruths throughout your motion.

However I would like to inform you through this letter that I have no plans to contest your motion filed with the court. Nor will my attorneys of record be responding to your motion in my behalf, or seek a stay of execution in my behalf.

Mr. Billingsley, I would like to further inform you that I fully agree with you on one truth stated in your motion. I have been incarcerated and housed on death row for more than 25 years, pursuing various appeals in the judicial system. So I conclude and agree with you that an execution date should be set promptly by the court in the immediate future.

Furthermore sir, if there are any further steps you can take to insure that an execution date be set in an expedious [sic] manner, I would be grateful if you would pursue those avenues in my case at your earliest convenience.

Respectfully Submitted:

/s/ David L. Nelson
David Larry Nelson
Z-383, 5-77
100 – Warrior Lane
Bessemer, Alabama
85023-7299

cc. Attorneys

Michael K. McIntyre
H.Victoria Smith
Clerk,
Alabama Supreme Court

DAVID LARRY NELSON,)
Plaintiff,)
v.) Case No. _____
STATE OF ALABAMA,)
Defendant.)

AFFIDAVIT OF DR. MARC SONNIER

I, Marc Sonnier, do solemnly swear to the following facts:

1. I am a medical doctor employed by Naphcare, a company currently under contract to provide health care for the State of Alabama prison system. I received a Bachelor of Science degree in biology from the University of South Alabama in 1975 and a medical degree, also from the University of South Alabama, in 1981. I have worked in my current position for more than a year. I have been asked to describe and comment on several procedures medical personnel can undertake to locate a vein, for the purposes of drawing blood or setting up an IV line, from an individual who has compromised veins due to extensive intravenous drug use.

2. It is my understanding that the first procedure to be attempted will be to locate and attach the IV to the femoral vein located in the upper thigh. This is a routine procedure that I have conducted approximately 80 to 100 times in the past for the purpose of drawing blood from an individual with no superficial veins. Based on my knowledge, experience, and observations of the patients during the procedure, it is my opinion that it causes minimal pain similar to that experienced from a needle stick in the arm. In all the times I have conducted the procedure, I have been

unable to successfully locate the vein approximately 8 to 10 times. In each of those instances, however, the failure can be attributed to the fact that the patient was obese.

3. I have been told that the second procedure to be attempted is to attach the intravenous line to the external carotid vein located in the neck. I have done this procedure 8-10 times. The external carotid vein provides access to an IV line and is actually a bigger caliper vessel than the ones in the lower arms and hands. The pain involved with this procedure would be no worse than if someone were attaching an IV to the wrist or arm.

4. It is my understanding that the next procedure to be attempted, if necessary is to perform a "cut-down" procedure by making a two inch incision in the antecubital fossa located in the front part of the arm in the bend of the elbow. The procedure involved here is to isolate and dissect the saphenous vein that is relatively easily accessible just beneath the skin. This is a procedure that I have employed 8-10 times. The procedure itself is painless because a local anesthetic is used.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2003, in, Alabama.

/s/ Marc Sonnier MD
Marc Sonnier

Sworn and subscribed before me this the 7 day of ~~September~~ October 2003.

/s/ [Illegible]
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, v. DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, GRANTT CULLIVER, Warden of Holman Correctional Facility.	)	Case No. ___

AFFIDAVIT OF WARDEN GRANTT CULLIVER

I, Grantt Culliver, do solemnly swear to the following facts:

1. I am presently employed with the Alabama Department of Corrections as Warden of the Holman Correctional Facility. I have been employed in that capacity since August 2002. Before I became Warden at Holman, I was Warden at Fountain Correctional Facility.

2. Seven to ten days before receiving the execution warrant on September 3, 2003, I spoke on the telephone with Victoria Smith, who told me she was David Nelson's' legal counsel. Ms. Smith said that Nelson's vein structure was poor in his lower arms and hands due to intravenous drug use. Ms. Smith brought up the possibility of whether Nelson could be electrocuted because she believed it would be difficult to find a vein for the purpose of carrying out the execution by lethal injection. I told Ms. Smith that

according to state law it was too late for Nelson to select the option of being electrocuted.

2. Because these concerns were expressed to me, I had a registered nurse examine Nelson around September 10 to see whether a vein could be found on his lower arms and hands to administer the lethal injection. The nurse reported to me that Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line.

3. Approximately three weeks ago, a second nurse examined Nelson in my presence. Nelson knew this nurse from Donaldson and reminded her that the medical personnel at the Donaldson Correctional Facility were unable to draw blood from Nelson's lower arms and hands because of his intravenous drug use. Nelson raised his pants leg to remind her of the location where the medical personnel took blood from him.

4. Because of the above-described facts, I have recently been in contact with a physician who resides in Alabama who has agreed to perform any procedures necessary to connect a direct intravenous line. The doctor has told me that he will first attempt to connect a direct intravenous line to the femoral vein located in the thigh. If this procedure is unsuccessful, the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck. The doctor told me that he has performed these procedures hundreds of times. The last procedure that the doctor will attempt, should it become necessary, will be to make a 2 inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The doctor told me that

this last procedure involves the administration of a local anesthetic.

5. Neither Nelson nor his lawyers have ever requested that a physician be admitted into Holman to perform an examination of Nelson.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2003, in Montgomery, Alabama.

/s/ Grantt Culliver
Grantt Culliver

Sworn and subscribed before me this the 6th day of Ocotber [sic], 2003.

/s/ Marie F. Newman
Notary Public

Notary Public, AL State at Large
My commission expires 10/16/04

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, vs. DONAL CAMPBELL, In his individual and official capacity as Commissioner of the Alabama Department of Corrections and GRANTT CULLIVER, In his individual and official capacity as Warden of William C. Holman Correctional Facility, Defendants.	)	Civil Action File No. 03-T1008-N

REPLY TO DEFENDANTS' MOTION TO DISMISS

Now Comes Plaintiff David Larry Nelson by and through undersigned counsel who submits his response to the Defendants' Motion to Dismiss.

The Defendants in their Motion to Dismiss rely upon the Affidavit of Warden Grantt Culliver and the Affidavit of Dr. Marc Sonnier.

Dr. Mark Heath, a Board Certified anesthesiologist who submitted an Affidavit that was attached to the Plaintiff's Complaint for Injunctive and Declaratory Relief as Attachment 6 and that outlined specific dangers associated with the procedure the Defendants represented to the Plaintiff and counsel for the Plaintiff that the Defendants intended to perform on the Plaintiff, has reviewed those

Affidavits. Dr. Heath's response to the two affidavits submitted by the Defendants is contained in another Affidavit attached hereto.

Of significant importance is the fact that the physician consulted as an expert by the Defendants intends to attach an intravenous line to the "external carotid vein". (See Paragraph 3 of Dr. Marc Sonnier's Affidavit). As Dr. Heath points out, **"The 'external carotid vein' does not exist in human beings"**. (See Paragraph 5 of Dr. Mark Heath's Affidavit, attached hereto). Additionally, Dr. Ernest April, who is an Associate Professor of Anatomy at Columbia University and Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (See Paragraph 7 of Dr. Mark Heath's Affidavit, attached hereto).

It is respectfully submitted that this fact alone supports the Plaintiff's contentions and concerns and should convince this Court to deny the Defendants' Motion to Dismiss.

WHEREFORE it is respectfully [sic] that this Court deny the Defendants' Motion to Dismiss and grant the relief requested by the Plaintiff in his Complaint.

Respectfully submitted,

/s/ Joe W. Morgan III by
by M.K.M. w/express permission

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[Certificate Of Service Omitted In Printing]

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

My name is Mark Heath, M.D., and I have previously submitted an Affidavit regarding Mr. David Nelson's execution.

1.

I have reviewed two affidavits faxed to me at 2:19 PM Eastern Time on October 7, 2003 by Mr. Nelson's attorneys.

2.

The affidavit of Grantt Culliver quotes a registered nurse's finding that David Nelson does "not have any veins in his lower arms and hands sufficient to support a direct intravenous line".

3.

Based on David Nelson's history of intravenous drug abuse (IVDA) and the established lack of visible peripheral veins, it is highly likely that the personnel staffing his execution will be required to place a central line in either the femoral vein (in the groin), the subclavian vein (behind the clavicle or collar bone), or in one of the jugular veins (in the neck) – in internal or external jugular vein.

4.

The affidavit of Grantt Culliver states that "the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck".

5.

The "external carotid vein" does not exist in human beings.

6.

The term "external carotid vein" is not listed in Stedman's Medical Dictionary and it is not listed in Dorland's Medical Dictionary.

7.

Dr. Ernest April, Associate Professor of Anatomy at Columbia University in New York City and Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (Personal Communication at 2:45 P.M.).

8.

It can be speculated that Mr. Culliver intended to refer to the "external jugular vein", a commonly-used structure for obtaining intravenous access if peripheral access can not be secured.

9.

I note that Mr. Culliver's affidavit preceded the Affidavit of Dr. Marc Sonnier by one day.

10.

Dr. Sonnier in his affidavit states that he has been instructed that, if necessary, he should place a catheter in the "external carotid vein" of Mr. Nelson for the purpose of performing lethal injection. Dr. Sonnier uses the term "external carotid vein" twice in the same paragraph, and states that he has employed this procedure "8-10 times" (in his 22 years since graduating from medical school).

11.

Dr. Sonnier's repeated use of the term "external carotid vein", combined with his recitation of his "understanding" of the order of procedures to be attempted, raises in my mind the concern that he lacks currency and proficiency with the advanced techniques of intravenous access that almost certainly will be necessary for the conduct of Mr. Nelson's execution.

12.

The use of the term "external carotid vein" by both Mr. Culliver and Dr. Sonnier can not be coincidental. It raises in my mind the concern that Dr. Sonnier is acting under instruction from Mr. Culliver, and that these instructions include specification of technical medical issues that are likely to beyond the professional training and credentialing of Mr. Culliver.

13.

A further concern is that Dr. Sonnier states that he might perform a cut-down procedure on David Nelson's arm. It is highly likely that, due to Mr. Nelson's history of intravenous drug abuse, the deep and superficial veins of his arm will be scarred and/or thrombosed (occluded by clot), thereby rendering a cut-down procedure in the arm ineffective. Surgical exploration of Mr. Nelson's arm is likely to be technically challenging and painful. Dr. Sonnier's stated experience with cut-downs is "8-10 times" over the entirety of his medical career. It needs to be determined whether Dr. Sonnier has been credentialed by his employer, Naphcare, or by any hospital in Alabama, to perform this surgical procedure. A prior experience of "8-10 times" is not sufficient for contemplating surgical exploration of the arm of an intravenous drug abuser with known compromise of subcutaneous veins.

14.

It is difficult for me to understand why the State of Alabama would not want to recruit a well-trained, highly proficient, currently credentialed surgeon to supervise and/or perform the procedures required for establishing intravenous access. This level of expertise is clearly warranted by the recognized condition of Mr. Nelson's peripheral veins.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Mark Heath, M.D.
MARK HEATH, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, vs. DONAL CAMPBELL, In his individual and official capacity as Commissioner of the Alabama Department of Corrections and GRANTT CULLIVER, In his individual and official capacity as Warden of William C. Holman Correctional Facility, Defendants.	)	**DEATH PENALTY** Civil Action File No. 03-T1008-N

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

(Filed Oct. 7, 2003)

Now Comes Plaintiff David Larry Nelson by and through undersigned counsel and, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure who amends his original Complaint in the above-styled matter as follows:

Plaintiff hereby incorporates by reference Paragraphs 1 through 87 of his original Complaint and amends said Complaint as set forth below.

88. The Defendants through their actions are treating the Plaintiff with "deliberate indifference". *See Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).

89. The Defendants' "deliberate indifference" to the Plaintiff's serious medical needs violates the Eighth Amendment's prohibitions against cruel and unusual punishments and creates a risk of "unnecessary and wanton infliction of pain". *See Estelle v. Gamble*, 429 U.S. 97 (1976).

The Prayer for Relief remains the same as in the original Complaint.

[signatures on next page]

/s/ Joe W. Morgan, III
by M.K.M. w/express permission
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286 F.Supp.2d 1321

United States District Court,
M.D. Alabama,
Northern Division.

David Larry NELSON, Plaintiff,
v.
Donal CAMPBELL and Grantt Culliver, Defendants.

No. CIV.A. 03T1008N.

Oct. 7, 2003.

Joe Wilson Morgan, III, Birmingham, Michael Kennedy McIntyre, H. Victoria Smith, Atlanta, GA, for David Larry Nelson, plaintiff.

J. Clayton Crenshaw, Michael B. Billingsley, Office of the Attorney General, Montgomery, for Donal Campbell, in his individual and official capacity as Commissioner of the Alabama Department of Corrections, Grantt Culliver, defendants.

OPINION

MYRON H. THOMPSON, District Judge.

Plaintiff David Larry Nelson, an inmate at Holman Correctional Facility in Atmore, Alabama, is scheduled to be executed by lethal injection at 6:00 p.m. on October 9, 2003, for the murder of Wilson Thompson. On October 6, 2003, Nelson filed a complaint under 42 U.S.C.A. § 1983 against defendant Donal Campbell, the Commissioner of the Alabama Department of Corrections, and defendant Grantt Culliver, the Warden of Holman, alleging that a medical procedure that will be carried out prior to his execution will constitute cruel and unusual punishment, as proscribed by the Eighth Amendment to the United

States Constitution. Specifically, Nelson alleges that he has compromised veins because of his years of intravenous drug use and that the procedure the defendants have proposed for accessing a vein to administer the lethal injection is "invasive and barbaric" and may subject him to a "substantial risk of . . . substantial and prolonged pain."[1] Nelson seeks an order staying his execution, an order directing the defendants to provide him with "the protocol concerning the medical procedure which will be followed to gain venous access as a predicate to [his] execution," an order requiring the defendants to "consult with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment," and an order compelling the defendants to comply with state law on death row prisoners' right of access to their physicians.[2] The defendants have filed a motion to dismiss for lack of jurisdiction.

I. BACKGROUND

In order to understand the relief Nelson is requesting, it is necessary to summarize briefly the procedure the State has proposed using.

Nelson's veins have been severely compromised due to years of intravenous drug use. He alleges that, over the last two decades, prison medical personnel have encountered difficulty gaining venous access during routine

[1] Complaint for injunctive and declaratory relief, filed October 6, 2003 (Doc. No. 1), pp. 9, 12.

[2] *Id.* at 19.

physical examinations.[3] Therefore, some alternative method besides a simple catheter in his arm will be necessary to gain access to his veins. Nelson brings this suit challenging the protocol the State has proposed using in order to gain intravenous access to his veins to administer the lethal injection.

Warden Culliver has presented an affidavit, confirmed by the doctor who will conduct the procedure, which states that, to administer the lethal injection, the doctor will attempt to attach a direct intravenous line to the femoral vein in Nelson's thigh, or, if that does not work, to the "external carotid vein" in Nelson's neck. In the event these are both unsuccessful, the defendants propose making a "2 inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure"[4]; this procedure, which is referred to as a "cut-down procedure," would be done using a local anesthetic.

Nelson has submitted expert testimony from Dr. Mark Heath stating, first, that the "external carotid vein" referred to by both Warden Culliver and Dr. Marc Sonnier, the defendants' expert, does not exist in human beings.[5] Dr. Heath further states that because of Nelson's history of intravenous drug use and the lack of visible peripheral

[3] Complaint for injunctive and declaratory relief, filed Oct. 6, 2003 (Doc. No. 1), p. 3.

[4] Affidavit of Warden Grantt Culliver, Attachment to Motion to dismiss, filed Oct. 7.2003 (Doc. No. 4), p. 3.

[5] Second affidavit of Mark Heath, M.D., Attachment to Reply to defendants' motion to dismiss, filed October 7, 2003 (Doc. No. 11), ¶ 5, 6, 7. Dr. Heath speculates that Warden Culliver may have intended to refer to the "external jugular vein."

veins in his lower arms and hands, medical personnel will probably have to place a central line in the femoral vein, which he states is in the groin, not the thigh; the subclavian vein behind the collar bone; or the jugular vein in the neck.[6]

Dr. Heath states that a cut-down procedure, which defendants intend to perform under local anesthetic, is "usually performed under deep sedation . . . because it would otherwise be an extraordinarily disturbing and distressing experience."[7] The procedure "involves making a series of surgical incisions through the skin, . . . underlying connective tissue, . . . layers of fat, [and] . . . layers of muscle, until the region surrounding a large vein is reached."[8] Such a procedure entails numerous risks (such as severe hemorrhage, extreme pain, cardiac arrest and asphyxia), and therefore should only be performed by a specialist.[9] Dr. Heath states that an attempt to perform a cut-down procedure on Nelson's arm will likely be "ineffective" because Nelson's veins will likely be "scarred and/or thrombosed (occluded by clot)" due to his history of intravenous drug use.[10]

According to Nelson, using a cut-down procedure is contrary to modern medical practice, and there is a less invasive, less painful, and safer alternative, referred to as

[6] *Id.* at ¶ 3.

[7] First affidavit of Mark Heath, M.D., Attachment 6 to Complaint for injunctive and declaratory relief, filed Oct. 6, 2003 (Doc. No. 1), ¶¶ 14, 13.

[8] *Id.* at ¶ 9.

[9] *Id.* at ¶ 18.

[10] Second Affidavit of Mark Heath, M.D., at ¶ 13.

"percutanous central line placement."[11] The defendants have offered no explanation as to why they intend to use a cut-down procedure instead of a percutaneous central line placement. Nelson requests that his execution be stayed long enough for this court to consider the merits of his claim that the use of a cut-down procedure constitutes cruel and unusual punishment under the Eighth Amendment.

II. STATE CLAIM

Nelson seeks an order requiring the defendants to abide by 1975 Ala.Code § 15-18-81, which provides that a condemned person's physician "shall be admitted to see him when necessary to his health." The defendants have moved to dismiss this claim on the grounds that this court does not have jurisdiction to order state officials to comply with state law. The court agrees that it is barred by *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984), from granting relief on Nelson's state-law claim. Accordingly, Nelson's state-law claim will be dismissed.

III. FEDERAL CLAIM

Nelson claims that the procedure by which the defendants plan to access his veins to administer the lethal injection – the so-called "cut down" procedure – will constitute cruel and unusual punishment under the Eighth Amendment. Nelson seeks an order staying his

[11] First affidavit of Mark Heath, M.D., at ¶ 23.

execution, requiring the defendants to divulge the exact protocol they intend to follow, and directing the defendants to develop a protocol that comports with contemporary medical standards. The defendants have moved to dismiss Nelson's federal claim on the ground that, while brought under 42 U.S.C.A. § 1983, it is the equivalent of a habeas corpus claim and, as a result, this court is barred from hearing the claim by 28 U.S.C.A. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132 (AEDPA). The court agrees that, under binding Eleventh Circuit Court of Appeals case law, this claim is due to be dismissed for lack of jurisdiction.

The Eleventh Circuit has held that when a prisoner brings an action under § 1983 that is the "functional equivalent" of a habeas corpus petition, the § 1983 action is to be treated as a habeas corpus petition and subjected to the limits imposed on successive petitions in 28 U.S.C.A. § 2244. *Fugate v. Dep't of Corr.*, 301 F.3d 1287, 1288 (11th Cir.2003); *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301, 1303 (11th Cir.2002); *Hill v. Hopper*, 112 F.3d 1088, 1088-89 (11th Cir.1997); *Felker v. Turpin*, 101 F.3d 95, 96 (11th Cir.1996). The Eleventh Circuit has applied this rule on a number of occasions to § 1983 claims alleging that a particular manner of execution violates the Eighth Amendment. *See, e.g., Fugate*, 301 F.3d at 1288, *Hill*, 112 F.3d at 1088. The Eleventh Circuit has also strongly suggested that any § 1983 claim that seeks a stay of execution should be treated as a habeas claim. *See Spivey*, 279 F.3d at 1303 n. 3; *cf. Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir.2002) (Edmondson, C.J., specially concurring) (noting that an important reason the § 1983 claim before the court did not need to be treated as a habeas petition was that the petitioner did not seek a stay of execution). Constrained as it is by the

Eleventh Circuit's precedent, the court must conclude that Nelson's claim – which challenges procedures closely related to his execution and seeks a stay of execution – must be treated as a habeas petition.

As Nelson's counsel conceded in a telephone conference on October 7, 2003,[12] Nelson has already exhausted his habeas relief in this matter. *See Nelson v. Alabama*, 292 F.3d 1291 (11th Cir.2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1573, 155 L.Ed.2d 319 (2003); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir.1993). Under 28 U.S.C.A. § 2244(b), a prisoner is presumptively barred from bringing successive habeas petitions except in limited circumstances.[13] Further, 28 U.S.C.A. § 2244(b)(3)(A) requires that a prisoner wishing to bring a second habeas petition

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[12] Transcript of In-Chambers Telephone Conference, October 7, 2003, p. 22.

[13] 28 U.S.C.A. § 2244(b) reads in part:

"(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

must obtain approval from the court of appeals to do so.[14] Because Nelson did not first apply to the court of appeals for approval to file a second habeas petition, this court does not have jurisdiction to hear his claim. *Fugate,* 301 F.3d at 1288; *Spivey,* 279 F.3d at 1303. Accordingly, Nelson's Eighth Amendment claim must be dismissed.

IV. CONCLUSION

The court recognizes that the import of the dismissal of this lawsuit is that Nelson will be effectively left without a federal forum for review of his Eighth Amendment claim.

Nelson is not asking the court to permanently stop his execution;[15] instead, he is asking that his lethal injection be delayed until he is assured that a safe, medically

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[14] 28 U.S.C.A. § 2244(b)(3)(A) reads:

> "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

[15] This fact – that Nelson is not seeking a *permanent* stay of his execution – makes this case arguably factually different from *Fugate v. Dept. of Corrections,* 301 F.3d 1287 (11th Cir.2002), *Hill v. Hopper,* 112 F.3d 1088 (11th Cir.1997), and *Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996). In all of these cases, death row inmates brought § 1983 actions seeking stays of execution on the ground that the method of their execution violated the Eighth Amendment. Here, Nelson does not challenge the lethal injection itself, but a unique procedure that must be carried out on him alone in order to gain access to his compromised veins so that the lethal injection can occur. This factual difference, however, does not detract from the conclusion that Nelson is still seeking a stay, albeit a temporary one, of his execution, and it is this stay request that brings this case within the restrictions of habeas relief as applied by the Eleventh Circuit.

acceptable procedure will be used to gain access to his veins. Nelson claims the State of Alabama is planning to perform an allegedly barbaric and dangerous medical procedure on him even though there is a safer alternative available. In other words, Nelson is asking the State to comply with the Eighth Amendment to the Constitution by refraining from inflicting unnecessary and wanton pain upon him. *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976).

Nelson did not know about the State's plan to use a "cut-down" procedure until earlier this year, so he could not have raised the issue in the federal habeas action he filed in 1997. Nonetheless, he almost certainly cannot obtain relief now by filing another habeas petition because his claim does not depend on a new constitutional principle or on newly discovered facts that show actual innocence. *See* 28 U.S.C.A. § 2244(b)(2)(A) & (B). Nor, for the reasons given in Part III of this opinion, can Nelson obtain non-habeas relief.

The rule that a § 1983 action seeking a stay of execution must be treated as a habeas petition means that, after a death row inmate has filed his first federal habeas petition, he can never obtain a stay of execution from a federal court so that court can review a claim of an Eighth Amendment claim regarding any later decision as to how the execution is to be carried out. The rule means that no matter how meritorious Nelson's claim is, and despite the fact that he could not raise his claim in his earlier habeas petition, there seems to be no way for him to obtain federal relief now.

This rule also distinguishes between death row inmates whose execution dates are imminent and those

whose are not. In *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir.2002), the Eleventh Circuit allowed a death row inmate's § 1983 action, which did not include a request for a stay of execution, to proceed because a judgment in favor of the plaintiff would not "necessarily imply the invalidity of his conviction or sentence," *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). There, the plaintiff sought access to evidence for the purposes of DNA testing, and the court noted that a judgment in his favor would merely give him access to the evidence, without implying anything about the validity of his sentence.

Likewise, here a judgment for Nelson would not imply anything about the validity of his conviction or sentence, but would simply compel the State to use a humane procedure to gain access to Nelson's veins for the purpose of administering a lethal injection. The only distinction between this § 1983 claim and the one in *Bradley* is that Nelson is scheduled to be executed in two days, with the procedure to be carried out before the execution, and thus a stay of execution is necessary for his case to be heard at all. However, Eleventh Circuit law is clear that such a stay can be obtained through only habeas relief – relief which is now foreclosed.

It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. However, as the law now stands, that is, absent a change by either the Eleventh Circuit or the United States Supreme Court, no such relief seems to be available.

An appropriate judgment will be entered.

JUDGMENT

In accordance with the memorandum opinion entered this date, the following is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The motion to dismiss, filed by defendants Donal Campbell and Grantt Culliver, on October 7, 2003 (Doc. No. 4), is granted.

(2) Plaintiff David Larry Nelson's complaint, filed on October 6, 2003 (Doc. No. 1), as amended on October 7, 2003 (Doc. No. 10), is dismissed without prejudice.

It is further ORDERED that costs are taxed against plaintiff Nelson, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

DAVID LARRY NELSON, Plaintiff, v. DONAL CAMPBELL and GRANTT CULLIVER, Defendants.	)	CIV. ACTION NO. 03-T-1008-N **DEATH PENALTY**

JUDGMENT

(Filed Oct. 7, 2003)

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It is further ORDERED that costs are taxed against plaintiff Nelson, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done, this the 7th day of October, 2003.

/s/ [Illegible]
MYRON H. THOMPSON
UNITED STATES
DISTRICT JUDGE

347 F.3d 910

United States Court of Appeals,
Eleventh Circuit.

David Larry NELSON, Plaintiff-Appellant,
v.
Donal CAMPBELL, in his individual and official capacity as Commissioner of the Alabama Department of Corrections, Grantt Culliver, Defendants-Appellees,

No. 03-15095.

Oct. 8, 2003.

Harriet Victoria Smith, *Michael K. McIntyre*, Law Office of Michael McIntyre, Atlanta, GA, for Plaintiff-Appellant.

J. Clayton Crenshaw, Michael Boysie Billingsley, Alabama Atty. Gen., Montgomery, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before ANDERSON, *HULL* and WILSON, Circuit Judges.

ANDERSON, Circuit Judge:

David Larry Nelson is an Alabama inmate convicted of capital murder and sentenced to death. On October 6, 2003, three days prior to his scheduled execution, Nelson filed a 42 U.S.C. § 1983 action in the Middle District of Alabama. In his complaint, Nelson asserts that he has severely compromised veins and that Alabama's proposed use of a "cut-down" procedure to gain venous access (if access to a suitable vein cannot be achieved) as part of the lethal injection procedure constitutes cruel and unusual

punishment in violation of the Eighth and Fourteenth Amendments.[1] Nelson further asserts a state law claim, pursuant to 28 U.S.C. § 1367, alleging that he has been denied access to his physician in violation of Alabama law. Among other relief, Nelson requests an order granting injunctive relief and staying his execution scheduled for October 9, 2003. By order dated October 7, 2003, the district court dismissed Nelson's complaint for lack of jurisdiction. We affirm.

As we stated in *Hill v. Hopper,* 112 F.3d 1088, 1088-89 (11th Cir.1997), "a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim." *See also Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996); *Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d 1301 (11th Cir.2002).

The full procedural history of this case prior to the instant § 1983 claim is set out in detail in *Nelson v. Alabama,* 292 F.3d 1291, 1293-94 (11th Cir.2002). However, for the purposes of this appeal it is sufficient to state that Nelson previously filed a federal habeas petition on April 14, 1997, alleging error due to the trial court's failure to conduct a *Faretta* hearing prior to allowing him to proceed *pro se* at his 1994 re-sentencing hearing. *Nelson v. Alabama,* 292 F.3d at 1294.[2]

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[1] The "cut-down" procedure would require making a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The procedure would be performed using local anesthetic.

[2] Additionally, Nelson, through his counsel, acknowledged that he had exhausted all available habeas corpus relief and that he would have to get permission from the Eleventh Circuit in order to file a

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Because Nelson has previously filed a federal habeas petition, we are confronted with the question of whether Nelson's complaint seeking relief under 42 U.S.C. § 1983 constitutes the "functional equivalent" of a second or successive habeas petition, such that it would be subject to the requirements of 28 U.S.C. § 2244. *Fugate v. Dep't of Corrs.*, 301 F.3d 1287, 1288 (11th Cir.2002); *Hill v. Hopper,* 112 F.3d at 1089; *Felker v. Turpin,* 101 F.3d at 96. Nelson's § 1983 claim alleges that Alabama's proposed possible[3] use of the "cut-down" procedure to gain venous access as part of the lethal injection procedure constitutes cruel and unusual punishment. We addressed a similar § 1983 claim in *Fugate v. Department of Corrections,* 301 F.3d 1287. The plaintiff in *Fugate* asserted, among other challenges to the State of Georgia's lethal injection procedure, that the use of a "cut-down" procedure in the absence of a suitable vein violated the Eighth and Fourteenth Amendments. Compl. for Injunctive Relief and Decl. J., filed Aug. 12, 2002, ¶¶ 24-28, *Fugate v. Dep't of Corrs.,* No. 02-02219-CV-CC (N.D.Ga. Aug. 13, 2002). On appeal, we held that the district court properly dismissed the § 1983 action to "enjoin and restrain the defendants from executing [Fugate] until they [took] certain measure[s] to minimize the risk of unnecessary pain, suffering and mutilation

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second or successive habeas petition. Tr. of In-Chambers Tel. Conference, Oct. 7, 2003, at *22-23.

[3] We say "possible" because Alabama first proposes to gain venous access through a femoral vein in Nelson's thigh and if unsuccessful through the external carotid artery in Nelson's neck, neither of which procedure Nelson challenges. It is only if venous access cannot be readily gained in those two areas that Alabama proposes to use the third alternative of the "cut-down" procedure.

during the execution process," because the § 1983 action constituted the "functional equivalent" of a second habeas petition. 301 F.3d at 1288. Pursuant to *Fugate,* we conclude that Nelson's § 1983 claim also constitutes the "functional equivalent" of a second habeas petition as it seeks an immediate stay to the imposition of Nelson's death sentence. *See Fugate,* 301 F.3d at 1288; *Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d 1301, 1303 & n. 4. We believe that the instant case is indistinguishable from *Fugate;* both sought to minimize the risk of unnecessary pain during the execution process, and both sought to stay the execution until appropriate corrective measures were taken.

Because Nelson's § 1983 claim was the "functional equivalent" of a second habeas petition and because Nelson did not get our permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim. *Fugate,* 301 F.3d at 1288; *Hill,* 112 F.3d at 1089. Moreover, even had Nelson sought our permission to file a second habeas petition, the facts alleged indicate that Nelson's application would have been denied pursuant to 28 U.S.C. § 2244(b)(2) because his cruel and unusual punishment claim neither "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," nor has a "factual predicate for the claim [that] could not have been discovered previously through the exercise of due diligence . . . [that] if proven and viewed in light of the evidence as a whole, would be sufficient to establish . . . that, but for constitutional error, no reasonable factfinder would have found the applicant

guilty of the underlying offense." *See* 28 U.S.C. § 2244(b)(2); *Felker v. Turpin,* 101 F.3d at 97; *In re Provenzano,* 215 F.3d 1233, 1235-36 (11th Cir.2000) (involving an application for second habeas petition challenging lethal injection as administered by the State of Florida as cruel and unusual punishment and dismissing it because the claim did not meet the requirements of § 2244(b)(2)).

With respect to Nelson's state law claim, we agree with the district court that it is barred by *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1994).

For the foregoing reasons the district court's judgment dismissing Nelson's complaint is affirmed. Nelson's motion to enjoin defendants from executing him is denied.

The judgment of the district court is AFFIRMED[4], and Nelson's motion for stay of execution is DENIED.[5]

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[4] While the dissent's distinction of *Felker v. Turpin, Hill v. Hopper,* and possibly even *Gilreath v. State Board of Pardons & Paroles,* 273 F.3d 932 (11th Cir.2001), may be plausible, we believe its attempt to distinguish *Fugate* is flawed. As noted in our opinion, we do not believe *Fugate* is distinguishable. Fugate was no more attempting to avoid his sentence than is Nelson. Both asserted that they were not challenging their sentence. *See* Compl. for Injunctive Relief and Decl. J., filed Aug. 12, 2002, at *1, *Fugate v. Dep't of Corrs.,* No. 02-02219-CV-CC (N.D.Ga. Aug. 13, 2002) (first sentence) ("Fugate . . . brings this action pursuant to 42 U.S.C. § 1983 challenging not his sentence of death, nor lethal injection as a manner of inflicting death, but the failure of Georgia officials in changing from electrocution to lethal injection to take sufficient measures to minimize the risk of him experiencing extreme and excruciating pain"). In both this case and in *Fugate,* the appellants suggested less painful alternative ways to implement lethal injection. In short, both cases sought to "enjoin . . . the defendants from executing

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WILSON, Circuit Judge, dissenting:

The majority holds that Nelson's Eighth Amendment claim challenging the unique manner of his execution, filed under 42 U.S.C. § 1983, is the "functional equivalent" of a habeas petition, and is therefore subject to the requirements governing second or successive habeas petitions under 28 U.S.C. § 2244. In light of the clear authority indicating that Nelson's claim should be construed exclusively under § 1983, I strongly disagree with the majority's holding.

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him *until* they take certain measures to minimize the risk of unnecessary pain." *Fugate,* 301 F.3d at 1288 (emphasis added).

We also reject the dissent's suggestion that Nelson's attempt to stay his execution is irrelevant to the "functional equivalent" issue. *See Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d at 1303 (reviewing our decision in *Gilreath* and stating "In reviewing the denial of a motion for preliminary injunction to stay Gilreath's execution, the Court held that '[w]e look at the kind of relief Appellant seeks and conclude that, however the Appellant describes it, the motion was for habeas corpus relief.' "); *see also Spivey,* 279 F.3d at 1304 n. 4 (distinguishing the claim in *Spivey* from the claim in *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), stating "There, no execution date was imminent, and there is no indication that Woodard's claims would necessarily imply a challenge to the imposition of a death sentence."). Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus. *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir.2002), is readily distinguished from the instant case. That case involved no attempt to stay Bradley's execution, and no attempt to interfere with the implementation of the state sentence.

[5] The Appellant's request for oral argument is denied.

Nelson seeks only a temporary stay of execution until concerns regarding the manner of his execution are addressed.[1]

A complaint seeking § 1983 relief in the form of a temporary stay of execution is not automatically equivalent to a successive habeas petition. Before making the determination of whether such a stay should be considered a habeas petition or a civil rights action, the court must inquire into the fundamental question of whether the plaintiff is actually seeking to challenge either the fact of his conviction or the duration of his sentence – the touchstones of habeas relief.[2] If the plaintiff's § 1983 complaint "would necessarily imply the invalidity of his conviction or sentence," the complaint must be dismissed. *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). On the contrary, "if the plaintiff's action . . . even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* In this case, Nelson was

[1] The majority notes that Nelson filed his § 1983 claim only three days prior to his execution. However, the procedure at issue here had never before been implemented in Alabama and prison officials had to craft a special procedure to govern Nelson's execution. It is unclear at what point they finalized the procedure and notified Nelson of it. Even in light of the chance that Nelson seeks redress in the courts solely as a means of delaying the inevitable, the possibility of his only recently being notified of the procedure requires our caution.

[2] A court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *only on the ground* that he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254 (2003) (emphasis added). Here, Nelson does not make such a challenge.

sentenced to death by lethal injection, not by lethal injection subject to any painful secondary procedure that Alabama state prison officials deem appropriate. He thus challenges neither his conviction nor his sentence. Rather, he requests the opportunity to enforce his Eighth Amendment rights; an opportunity that, as noted by the district court, would be wholly absent if this action were deemed the equivalent of a second habeas petition.

Appellees assert that this case is controlled by this court's decision in *Fugate v. Dep't of Corrs.,* 301 F.3d 1287 (11th Cir.2002) (per curiam). In *Fugate,* an inmate sought a stay of execution, alleging that the manner in which Georgia administered its lethal injections was cruel and unusual under the Eighth Amendment. We held that the district court lacked jurisdiction to consider Fugate's claim because it was the functional equivalent of a second habeas petition, and he had not previously applied to this court for permission to file such a petition under § 2244(b)(3)(A). *See Fugate,* 301 F.3d at 1288. Although the facts in *Fugate* are similar to those in this case, *Fugate* does not control the question before us. Fugate was sentenced to death by lethal injection under Georgia law. By seeking a stay of execution on the basis of a challenge to Georgia's method of administering its lethal injections, Fugate was, in effect, attempting to avoid his specific sentence. Therefore, the decision that Fugate's claim was the "functional equivalent" of a successive habeas petition was reasonable.[3] The same is true of our decisions in *Hill*

[3] Nevertheless, I believe that our decisions in *Fugate* and its prior related cases are questionable under the standards defining habeas actions. A challenge to the *manner* in which an inmate is executed, in

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v. Hopper, 112 F.3d 1088 (11th Cir.1997) (per curiam) (holding that an inmate's constitutional challenge to electrocution as means of execution was the functional equivalent of a second habeas petition) and *Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996) (per curiam). Here, however, Nelson is not seeking to avoid execution by lethal injection under Alabama law. The "cut down" procedure that is to be used in his execution is not within Alabama's execution procedure, nor has it been reviewed to ensure that it passes muster under the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as "percutaneous central venous cannulation" be used to carry out his execution, rather than the outmoded and painful "cut down" procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence. However, with the implementation of the "cut down" procedure, Nelson's Eighth Amendment rights may be compromised in the process.

The district court noted that the rulings of the Eleventh Circuit appear to make a distinction between cases in which a death row inmate's execution is imminent and cases in which execution is not imminent. In *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir.2002), which was decided within weeks of *Fugate,* we held that a death row inmate's § 1983 action for production of DNA evidence was not a

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general, is not necessarily a challenge to the inmate's sentence of death or his conviction. The inmate's execution will presumably proceed, either in the same manner or in a different manner, pending subsequent proceedings. An avenue for review of Eighth Amendment claims must remain available to those facing death at the hands of the state.

successive habeas petition because it "neither directly, nor by necessary implication, attack[ed] the validity of his conviction and sentence." *Bradley,* 305 F.3d at 1288. In his concurrence, and without further explanation, Chief Judge Edmondson stressed that the fact that Bradley did not request a stay of his execution as part of his claim was an "important" part of his decision. *Id.* at 1292 (Edmondson, C.J., concurring).

However, I fail to see the relevance of a request for a stay of execution to the question of whether an action is the equivalent of a habeas petition. In *Gilreath v. State Bd. of Pardons & Paroles,* 273 F.3d 932 (11th Cir.2001) (per curiam), we held that a death row inmate's motion for a preliminary injunction to stay his execution pending an appeal in a clemency proceeding was equivalent to a second habeas petition. However, we did not hold that *every* motion for a stay of execution was tantamount to a petition for habeas relief. In fact, we stated in the opinion that "[w]e look to the kind of relief [the inmate] seeks from the federal courts" in determining whether a petitioner seeks habeas relief. *Id.* at 933. Since the inmate in *Gilreath* sought clemency, or relief from his penalty, it was clear that his petition for a stay of execution was for the purpose of attacking his sentence. Here, Nelson's request for a stay has no bearing on his conviction or his sentence, nor will it ever. If his stay is granted, he will at most have a limited opportunity to pursue his Eighth Amendment claims. Whatever the outcome, Nelson will be executed.

Nelson asks not to be spared; he asks only that he be executed humanely in accordance with his constitutional rights. The bottom line in this case is that the outcome of Nelson's petition has no effect on either his sentence or his conviction, and therefore cannot properly be construed

under any circumstances as the equivalent to a subsequent habeas petition. Therefore, pursuant to *Heck v. Humphrey,* Nelson's § 1983 action should be allowed to proceed. 512 U.S. at 487, 114 S.Ct. 2364. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15095-P

DAVID LARRY NELSON,

Plaintiff-Appellant,

versus

DONAL CAMPBELL, in his individual and official capacity as Commissioner of the Alabama Department of Corrections, GRANTT CULLIVER,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion October 8, 2003, 11th Cir., 2003, ___ F.3d ___)

(Filed Oct. 9, 2003)

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, BARKETT, HULL, MARCUS, and WILSON, Circuit Judges*.

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* Honorable Ed Carnes, United States Circuit Judge, recused himself and did not participate in these proceedings.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is **DENIED**.

The en banc process having been completed, the pending motion to stay the execution during en banc consideration is DENIED as moot.

/s/ J. L. Edmondson
CHIEF JUDGE

(ORDER LIST: 540 U.S.)

THURSDAY, OCTOBER 9, 2003

ORDER IN PENDING CASE

03-6821 NELSON, DAVID L. V. CAMPBELL, COMM'R,
(03A308) AL DOC, ET AL.

The application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-9011

December 1, 2003

Mr. Michael Kennedy McIntyre
507 The Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303

RE: David L. Nelson
v. Donal Campbell, Commissioner, Alabama
Department of Corrections, et al.
No. 03-6821

Dear Mr. McIntyre:

The Court today entered the following order in the above entitled case:

The motion of Alabama Physicians, Laurie Dill, et al. for leave to file a brief as *amici curiae* is granted. The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari are granted limited to the following Question: Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the

execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk